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In the
SUPREME COURT OF THE UNITED STATES

JUDITH M. KOENICK, *Petitioner,*

v.

REGINALD M. FELTON, ET AL., *Respondents*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

EUGENE R. FIDELL
(*Counsel of Record*)
FELDESMAN, TUCKER, LEIFER
FIDELL & BANK LLP
2001 L Street, N.W.
Washington, DC 20036
(202) 466-8960

DWIGHT H. SULLIVAN
AMERICAN CIVIL LIBERTIES
UNION OF MARYLAND
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES
UNION OF THE NATIONAL
CAPITAL AREA
1400 20th Street, N.W.
Washington, DC 20036
(202) 457-0800

Attorneys for Petitioner

6788

QUESTION PRESENTED

Does the Establishment Clause permit a state to require all public schools to close on Good Friday?

PARTIES TO THE PROCEEDING

The petitioner is Judith M. Koenick. The defendants below were Reginald M. Felton, President of the Board of Education of Montgomery County, and Paul Vance, Superintendent of Montgomery County Public Schools, both of whom were sued in their official capacities only. Dr. Vance has been succeeded by Jerry D. Weast, who is automatically substituted for him under Rule 35.3.

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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Judith M. Koenick petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, reported at 190 F.3d 259, is reproduced at Appendix A (1a-20a). The opinion of the United States District Court for the District of Maryland, reported at 973 F. Supp. 522, is reproduced at Appendix B (21a-38a).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on August 20, 1999. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The respondents are the President of the Board of Education of Montgomery County and the Superintendent of Montgomery County Public Schools. Even though these officials' powers are limited to Montgomery County, the district court ruled that they are state officers when it denied petitioner's motion for leave to add the Governor, the President of the State Board of Education, and the State Superintendent of Schools as defendants. Petitioner served her proposed second amended complaint on the Office of the Attorney General of Maryland. However, the Attorney General did not attempt to intervene and neither of the lower courts formally certified to him the fact that the constitutionality of a state statute was drawn into question. Since 28 U.S.C. § 2403(b) may apply, this petition is being served on the Attorney General of Maryland.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fourteenth Amendment provides in part:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . . .

Md. Code Ann., Educ. § 7-103(c) (1998) provides in part:

> (1) The following days are public school holidays:
>
> (i) Thanksgiving Day and the day after;
>
> (ii) Christmas Eve and from then through January 1;
>
> (iii) *The Friday before Easter and from then through the Monday after Easter*;
>
> (iv) Memorial Day; and
>
> (v) Primary and general election days.

(emphasis added).

STATEMENT OF THE CASE

This case involves the constitutionality of a Maryland statute, first enacted in 1865, mandating a statewide public school holiday lasting from the "Friday before Easter and from then through the Monday after Easter." MD CODE ANN., EDUC. § 7-103(c) (1998) (hereinafter § 7-103). Petitioner, a Jewish citizen and taxpayer of Montgomery County and the State of Maryland, maintains that the statute violates the Establishment Clause

as applied to the states by the Fourteenth Amendment.[1] She sought declaratory and injunctive relief under 42 U.S.C. § 1983.

Easter, the day on which Christians celebrate the resurrection of Jesus, is the holiest day in the Christian calendar. J.A. 157. Western churches use the Gregorian calendar to determine when Easter falls, while Eastern Orthodox churches use the Julian calendar. Thus, in most years the holiday is celebrated on different days by different Christian denominations. J.A. 162. The Friday before Easter is Good Friday, a traditional Christian day of fasting, abstinence and penance in remembrance of Jesus's crucifixion. J.A. 160. No secular rituals or secular celebrations are associated with Good Friday. J.A. 166, 169.

In the 1996-97 school year, the Montgomery County Public Schools (MCPS) held class every weekday during Passover, a Jewish festival commemorating the deliverance of the Hebrews from slavery in Egypt. J.A. 171. For more than 30 years, MCPS has closed its schools on Yom Kippur, the Jewish Day of Atonement. J.A. 137. This closure is based, in substantial part, on MCPS's finding that "large numbers of students are absent (more than 50% in some schools)" on Yom Kippur. J.A. 62. Beginning in 1974, MCPS also canceled school on the first day of Rosh

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[1] At the time she sued, petitioner was a teacher in the Montgomery County Public Schools. Relying on that status, she also challenged § 7-103 under the Equal Protection Clause because it provides Christian public school teachers with holidays on their religious holy days while providing no similar benefit to Jewish teachers. Because she retired while the case was on appeal, the Fourth Circuit held that she no longer had standing to pursue her equal protection claim. 3a. n.1 It held, however, that she did have standing as a taxpayer and citizen to pursue her Establishment Clause challenge. 8a.

Hashanah, the Jewish New Year. *Id.* This practice was instituted after a review of four years' data indicated that student and professional staff attendance dipped to approximately 85% on the first day of Rosh Hashanah. J.A. 63. However, a majority of Maryland's 24 public school systems remained open on Yom Kippur in 1996. J.A. 149, 173. Because the first day of Rosh Hashanah fell on a weekend in 1996, schools were closed throughout the state on that day. No Maryland school system canceled class on a weekday to recognize Rosh Hashanah in 1996. *Id.*

On March 28 and 30, 1997—the Friday before and Monday after the Roman Catholic and Protestant churches celebrated Easter—public schools were closed throughout the state. J.A. 173. According to the official MCPS calendar, schools were closed those days for "Easter." J.A. 150. Other Maryland school systems' calendars have sometimes indicated that schools are closed on the Friday before Easter for "Good Friday." J.A. 174-78. No public school system in Maryland closed on both April 25 and 28, 1997, the Friday before and the Monday after Eastern Orthodox churches celebrated Easter. J.A. 173.

Before the lower courts, petitioner maintained that by recognizing Christian holy days as public school holidays while failing to accord a similar status to any other religion's holy days, § 7-103 creates a denominational preference in favor of the Christian faith, thereby warranting strict scrutiny. She noted that the Attorney General of Maryland had previously stated, "the purpose of the section declaring public school holidays is to have uniformity throughout the State public schools on days that schools will not be in session." J.A. 180. She then demonstrated that, in fact, school calendars—including spring breaks—vary widely

among Maryland's public school systems, thus indicating that school calendar uniformity is not a compelling state interest. She also argued that even if strict scrutiny is not applied, the Good Friday school closing requirement violates the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

On July 2, 1997, the district court granted summary judgment for MCPS. 973 F. Supp. 522, 21a-38a. The court refused to apply strict scrutiny and held that § 7-103 satisfies *Lemon*'s three prongs.

The Fourth Circuit affirmed. 190 F.3d 259, 1a-20a. Like the district court, the Court of Appeals applied the *Lemon* test rather than strict scrutiny. The court concluded that the holiday satisfies *Lemon*'s first prong "because of the high rate of absenteeism expected on these days among students and teachers." 13a. The record contained no attendance data or survey results to support that expectation. The court found that the holiday also complies with *Lemon*'s second prong because all MCPS "students and teachers benefit equally from the four-day holiday." 17a. Finally, the court held that *Lemon*'s third prong is not violated by public school officials consulting commercially-printed calendars to determine when Easter falls. 19a.

REASONS FOR GRANTING THE PETITION

A. The Courts of Appeal are split on the constitutionality of mandating that public schools close on Good Friday.

This case raises the question of whether a state may mandate the closure of all its public schools on a purely religious holy day that has no associated secular traditions or content in the absence of any compelling factually-supported secular justification. When confronted with an Illinois law requiring public schools to close on Good Friday, the Seventh Circuit, in an opinion by Chief Judge Posner, held that the statute violated the Establishment Clause because Good Friday is "a day of solemn religious observance, and nothing else, for believing Christians, and no one else." *Metzl v. Leininger*, 57 F.3d 618, 620 (1995). The Fourth Circuit, in direct conflict, upheld a Maryland statute requiring public schools to close on Good Friday. Neither the outcomes nor the constitutional analyses that produced those outcomes can be reconciled. As a result, the officials who run more than 14,000 public school districts confront inadequate and conflicting guidance concerning school calendars and religious holidays. The Court should provide school systems nationwide with guidance for reconciling secular concerns over educational inefficiency on days when many students and teachers will be absent for religious reasons with the constitutional imperative to neither endorse nor disapprove of a particular religious denomination or religion in general.

The split between the Seventh Circuit and the Fourth Circuit over the constitutionality of mandating the closure of

public schools on Good Friday reflects an even larger divide among federal and state courts over the constitutionality of governmental recognition of Good Friday. Addressing such diverse matters as public school calendars, state employee work schedules, court and public library closings, and liquor sales, some courts have invalidated laws and policies according special status to Good Friday while others have found such laws unobjectionable.[2]

After twenty years of simmering in federal and state courts, these issues have come to a boil. Over a four-month period this year, three Circuits decided cases involving governmental recognition of Good Friday. These decisions

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[2] Only Maryland, Illinois, and North Dakota have statutes requiring all public schools to close on Good Friday. MD. CODE ANN., EDUC. § 7-103(c) (1998); 105 ILL. COMP. STAT. ANN. 5/24-2 (West 1998) (held unconstitutional in *Metzl*); N.D. CENT. CODE, § 15.1-06-02 (Supp. 1999). In 13 states, Good Friday is a legal holiday. DEL. CODE ANN. tit. 1, § 501 (1993); FLA. STAT. ANN. § 683.01 (West Supp. 1999); HAW. REV. STAT. ANN. § 8-1 (Michie 1993); 205 ILL. COMP. STAT. ANN. 630/17 (West 1993); IND. CODE ANN. § 1-1-9-1 (Michie 1998); LA. REV. STAT. ANN. § 1:55 (West Supp. 1999); MD. ANN. CODE OF 1957 art. 1, § 27 (1998); N.J. STAT. ANN. § 36:1-1 (West Supp. 1999); N.C. GEN. STAT. § 103-4 (1995); N.D. CENT. CODE § 1-03-01 (Supp. 1999); PENN. STAT. ANN. tit. 44, § 11 (West 1991); TENN. CODE ANN. § 15-1-101 (1999); WIS. STAT. ANN. § 895.20 (West 1997) (11:00 a.m. to 3:00 p.m.) (declared unconstitutional in *Freedom From Religion Foundation v. Thompson*, 920 F. Supp. 969 (W.D. Wis. 1996)). Two other states establish part of Good Friday as a statutory holiday for government employees. CAL. GOV'T CODE § 6700 (West 1995) (noon-3:00 p.m.) (declared unconstitutional in *Mandel v. Hodges*, 127 Cal. Rptr. 244 (Cal. Dist. Ct. App. 1976)); KY. REV. STAT. ANN. § 18A.190 (Michie 1998) (one-half day). In Texas, Good Friday is an "optional holiday" for state employees. TEX. GOV'T CODE ANN. § 662.003(c) (West 1994). Maryland and the Virgin Islands appear to be the only American jurisdictions in which Easter Monday is a statutory holiday. V.I. CODE ANN. tit. 1, § 171(a) (1995). Neither Good Friday nor Easter Monday is a federal holiday. 5 U.S.C. § 6103 (1994).

reveal a doctrinal chaos; rationales and outcomes have varied not only from circuit to circuit, but even within the same circuit. The importance of the issues involved, the deep and persistent divisions among the lower courts, and the doctrinal uncertainty that those courts' decisions exhibit warrant this Court's attention.

The nationwide uncertainty over this important Establishment Clause issue has practical ramifications. The official designation of holidays is vitally important. "Selecting a state holiday does much more than enable citizens to relax; it communicates a critical message about the state's priorities." *Cammack v. Waihee*, 932 F.2d 765, 786 (9th Cir. 1991) (Nelson, J., dissenting), *reh'g en banc denied*, 944 F.2d 466 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992). A holiday statute such as Maryland's "send[s] the message to non-Christians that" the state "finds Good Friday, and thus Christianity, to be a religion worth honoring, while their religion or nonreligion is not of equal importance." *Id.* at 788. That message is particularly significant in this case, since it is being sent to school children. As the Court has noted, special vigilance is necessary when "monitoring compliance with the Establishment Clause in elementary and secondary schools" because "[s]tudents in such institutions are impressionable and their attendance is involuntary." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). Section 7-103 affects all Maryland public school students, including the youngest and most impressionable primary school students. It forces adult members of minority religions to explain to their children why schools are closed on Good Friday, but remain open on their religious holidays. The statute sends a message of inclusion to Christian schoolchildren and a message of

exclusion to their Jewish, Muslim, and non-believing classmates. This official message violates the Establishment Clause.

The opinion below conflicts directly with the Seventh Circuit's decision striking down a similar Illinois statute. Chief Judge Posner's description of the regime that the Illinois statute established applies equally to the Maryland statute:

> School districts are free to close their schools on the major holidays of other religions, but all public schools throughout the state are forced to close on Good Friday *regardless of the preference of local school districts and no matter how small the number of students or teachers in a particular district who want to use the day for religious observances.*

Metzl, 57 F.3d at 621 (emphasis added). Additionally, under both the Illinois and Maryland statutes, "apart from Christmas and Thanksgiving, Good Friday is the only holiday of religious origin or character on which all the public schools of the state are closed." *Id.* at 619.

After concluding that Good Friday remains "a purely religious holiday," the Seventh Circuit held that canceling all classes statewide "accord[s] special recognition to Christianity beyond anything that has been shown to be necessary to accommodate the religious needs of the Christian majority." *Id.* The Seventh Circuit viewed this "special recognition" as providing a benefit to Christian students and teachers. For example, a Christian student

> does not have to absent himself from school on a school day, and so perhaps have to incur the inconvenience of a make-up exam on a

> later day, as the observant Jew might have to do if his school district decided not to close for any Jewish holidays.

Id. at 621. While the court viewed such inconvenience to non-Christian students as "slight," it emphasized that

> the First Amendment does not allow a state to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice *their* religion, *unless there is a secular justification for the difference in treatment.*

Id. (second emphasis added).

The Seventh Circuit found no secular justification for the Illinois statute. While Illinois argued that the Good Friday school closing was necessary because absenteeism would be unacceptably high if schools were to remain open, the *Metzl* majority held that the state did not satisfy its burden of proving such high absenteeism. *Id.* at 621-22. The Seventh Circuit noted that the level of student and teacher absenteeism on Good Friday, were school to be in session, "is a question of fact." *Metzl*, 57 F.3d at 621. The record, however, contained insufficient evidence to answer that question. Thus, the court noted, "the allocation of the burden of production of evidence becomes critical." *Id.* at 622. The Seventh Circuit concluded that the burden properly rested on the State of Illinois, reasoning:

> It was the state's decision to pitch its defense on the infeasibility of keeping the schools open on Good Friday. The question of feasibility is not one that can be settled as a matter of first or general principles. It

> requires a showing of fact that the state has not attempted to make.

Id. The court concluded that the state "failed to show that its law closing the public schools throughout the state on Good Friday is necessary to prevent a wasteful expenditure of educational resources." *Id.* at 623.

Under the Seventh Circuit's reasoning, the Maryland statute is similarly unconstitutional. Yet, in an opinion that fails to discuss—or even cite—*Metzl*, the Fourth Circuit applied an incompatible constitutional analysis to reach an irreconcilable result.

Like § 7-103, the Illinois law that *Metzl* invalidated was a public school calendar statute. Unlike its Illinois counterpart, § 7-103 does not mention Good Friday. Rather, it requires public schools to close from the "Friday before to the Monday after Easter." The textual difference is of no moment, however, because the Friday before Easter is, by definition, Good Friday. Maryland law expressly establishes "Good Friday" as both a legal holiday and a bank holiday. MD. ANN. CODE OF 1957, art. 1, § 27(a)(6) (1998); MD. CODE ANN., FIN. INST. § 5-705(a) (1998). When construed under the principle of *in pari materia*, Maryland's public school calendar statute creates a "Good Friday" holiday, just like the Illinois statute.

There are no secular rituals associated with Good Friday. J.A. 166, 169. Nor must public schools close in order to accommodate those students and teachers who wish to observe Good Friday. As religiously significant as it is, Good Friday is not a holy day of obligation for Roman Catholics. J.A. 163. Additionally, the Roman Catholic Church holds Good Friday services at about 3:00 p.m., unless pastoral reasons suggest a later hour. J.A. 160. Thus,

religious observances are unlikely to conflict with public school classes. If such a conflict were to arise, any student who chose to observe Good Friday during school hours would receive an excused absence to do so. MD. REGS. CODE tit. 13 § 13A.08.01.03(F) (1996). MCPS teachers who wish to observe religious holidays are granted either personal leave or, if their three personal leave days are exhausted, unpaid leave to do so. J.A. 33. Accommodation concerns therefore do not justify Maryland's across-the-board Good Friday public school closing.

Even if § 7-103 were correctly understood as creating an Easter holiday, rather than a Good Friday holiday, it would still impermissibly close the schools in recognition of a religious holy day. As Justice O'Connor has observed:

> The Easter holiday celebrated by Christians may be accompanied by certain "secular aspects" such as Easter bunnies and Easter egg hunts, but it is nevertheless a religious holiday.

County of Allegheny v. ACLU, 492 U.S. 573, 633 (1989) (O'Connor, J., concurring). Thus, regardless of whether § 7-103 establishes a holiday for Good Friday or for Easter, the Establishment Clause analysis remains the same.

The Fourth Circuit's decision was based, in part, on its conclusion that closing the public schools on Good Friday and Easter Monday conferred no special benefit on Christians. In the Fourth Circuit's view, "all Montgomery County students and teachers benefit equally from the four-day holiday." 17a. This conclusion slights the benefit of practicing one's faith without penalty or inconvenience. The Seventh Circuit, in contrast, recognized this special benefit when it observed that a "state law closing all public schools

on Good Friday makes the burden of religious observance lighter on Christians than on the votaries of other religions." *Metzl*, 57 F.3d at 621.

Again in conflict with Chief Judge Posner's *Metzl* opinion, the Fourth Circuit allowed MCPS officials to satisfy *Lemon*'s "secular purpose" prong by simply *assuming* that school attendance would be low if class were held on Good Friday. 13a. *Metzl*, on the other hand, concluded that where

> the challenged law places the support of the state behind a wholly sectarian holiday and the only possible justification concerns the internal operations of a branch of state government, the burden of presenting whatever type of fact might support the justification should rest on the state.

57 F.3d at 622; *see also Bridenbaugh v. O'Bannon*, 185 F.3d 796, 802-03 (7th Cir. 1999) (Fairchild, J., dissenting) ("burden of presenting evidence of justification rests on the state"), *reh'g en banc denied* (7th Cir. Aug. 19, 1999). The Fourth Circuit's opinion fails to explain why, in contrast to *Metzl*, it shifted the burden from the state to the plaintiff.

The Seventh Circuit's approach in *Metzl* highlights the distinction between the State of Maryland's closure of public schools for Good Friday and MCPS's closure of public schools for the Jewish High Holy Days. For more than a century, Maryland law has prohibited all public schools from holding class on Good Friday. Public school officials do not know—and have made no effort to learn—what the likely absentee rate would be were class to be held on Good Friday. In stark contrast, MCPS's decision to close public schools on the Jewish High Holy Days was

reached on the basis of empirical data indicating high absenteeism among students and teachers. That decision is consistent with Chief Judge Posner's analysis in *Metzl*; the State of Maryland's insistence that all public schools close on Good Friday is not. The Seventh Circuit's approach accords school systems the flexibility they need to avoid pedagogical inefficiency without endorsing any particular religious denomination.

The split between the Seventh and Fourth Circuits produces confusion for the state and municipal officials who manage the nation's 14,841 public school systems. *See* NAT'L CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 1998 at 97 (1999). The Court should grant certiorari to dispel this confusion. Definitive resolution of the issue would provide needed guidance to these school officials, as well as to other municipal, state, and federal policymakers who must grapple with holiday-closure issues.

B. The lower courts are split on the constitutionality of making Good Friday a public holiday.

The stark contrast between the Fourth Circuit's approach and that of *Metzl* is representative of the deep and persistent split among federal and state courts concerning the constitutionality of creating public holidays on religious holy days. In additional to *Metzl*, federal courts struck down Good Friday public holidays in *Freedom From Religion Foundation*, *supra* note 2 (statute making Good Friday afternoon a legal holiday is an unconstitutional establishment of religion), and *Speiller v. Whigham*, Civil No. 73-646 (S.D. Fla. July 13, 1974) (custom and practice of scheduling public

school system's spring recess to coincide with Good Friday is unconstitutional). State appellate courts have invalidated laws or policies giving Good Friday special status in *Griswold Inn v. State*, 441 A.2d 16 (Conn. 1981) (statute prohibiting sale of alcohol on Good Friday is an unconstitutional establishment of religion), *Mandel, supra* note 2 (policy of closing state offices from noon to 3:00 p.m. on Good Friday is an unconstitutional establishment of religion), and *Samuels v. Oberly*, No. 83M-JN-16 (Del. Super. Feb. 7, 1984) (available on LEXIS) (invalidating statute forbidding taverns to sell alcohol on Good Friday (repealed by 67 Del. Laws ch. 109, § 21 (1989)). *See also Bonham v. District of Columbia Library Admin.*, 989 F.2d 1242 (D.C. Cir. 1993) (reversing dismissal of challenge to closure of public library on the Protestant and Roman Catholic Easter Sunday), *on remand*, Civil No. 90-992 (D.D.C. Aug. 16, 1995) (upholding closure on basis of statistics showing that past library patronage on Easter Sunday was less than 30% of average Sunday patronage), *aff'd mem.*, No. 95-7218, 1996 U.S. App. LEXIS 20213 (D.C. Cir. July 17, 1996).

On the other hand, an ordinance establishing Good Friday as a holiday for municipal employees was upheld in *Franks v. City of Niles*, 29 Fair Empl. Prac. Cas. (BNA) 1114, 30 Empl. Prac. Dec. (CCH) 33,297 (N.D. Ohio 1982). Ten years later, a panel of the Ninth Circuit split two-to-one in upholding a Hawaii statute establishing Good Friday as a state holiday. *Cammack v. Waihee*, 932 F.2d 765 (9th Cir.), *reh'g en banc denied*, 944 F.2d 466 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992). Five of the six judges who dissented from denial of rehearing en banc opined that the Hawaii statute violates the Establishment Clause. 944 F.2d

466, 467, 472. Earlier this year, a divided panel of the Sixth Circuit rejected an Establishment Clause challenge to a Kentucky county court's practice of closing on Good Friday for a "Spring Holiday." *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999). Even more recently, a divided panel of the Seventh Circuit upheld an Indiana statute establishing Good Friday as a state holiday. *Bridenbaugh*, 185 F.3d 796. *Bridenbaugh* disagrees with the Seventh Circuit's earlier *Metzl* opinion concerning whether a Good Friday holiday confers a benefit on Christians and the burden a state defendant must meet to justify a closure on efficiency grounds. Additionally, two state appellate courts have upheld Good Friday holidays for public employees where the holidays resulted from collective bargaining agreements. *Americans United for Separation of Church and State v. Kent County*, 293 N.W.2d 723 (Mich. App. 1980); *California School Employees Ass'n v. Sequoia Union High School Dist.*, 136 Cal. Rptr. 594 (Cal. Dist. Ct. App. 1977).

The Court should grant certiorari to bring order to the lower courts' chaotic decisions concerning governmental recognition of Good Friday.

C. The lower courts badly need guidance for the resolution of Establishment Clause cases.

By granting review in this case, the Court can provide the lower courts with additional guidance concerning what the Fourth Circuit characterized as "the often-dreaded and certainly murky area of Establishment Clause jurisprudence." 6a.

The most fundamental issue in this case is the appropriate standard for evaluating holiday statutes under the Establishment Clause. Petitioner has maintained that strict scrutiny is appropriate because § 7-103 facially prefers the Christian faith. *See Larson v. Valente*, 456 U.S. 228, 246 (1982). The Fourth Circuit, however, declined to apply strict scrutiny because all students, not just Christians, receive a holiday on Good Friday. 10a. That reasoning directly conflicts with the Seventh Circuit's *Metzl* decision, which found that closing schools on Good Friday provides a benefit to Christians. 57 F.3d at 621; *see also id.* at 622 ("On its face, . . . the challenged statute, given the unambiguously sectarian character of Good Friday, promotes one religion over others . . . ."). Of course, some government practices that survive the *Lemon* test may nevertheless fail strict scrutiny. Accordingly, choice of the correct standard of review is the threshold question in any Establishment Clause case.

If the Court were to conclude that *Lemon* provides the correct analytical framework, this case presents an opportunity for it to explain *Lemon*'s application to symbolic unions between church and state, such as governmental recognition of religious holy days. In applying *Lemon*'s primary purpose and principal effect prongs to a symbolism case, a reviewing court should focus on whether the challenged practice satisfies an objective, religiously-neutral criterion. For example, no endorsement of religion is conveyed when a school system cancels class on a religious holy day when a 20% absentee rate is expected if the system also closes the schools for other events—secular as well as religious—that would produce a comparable absentee rate. On the other hand, religion *is* endorsed when a school system

shuts down for one religion's holy days but does not do so for another religion's holy days or secular events that can be expected, *based on facts such as attendance records or survey results*, to produce a comparable absentee rate. Only through the application of an objective, religiously-neutral criterion, such as factually-supported predicted absentee rates, can a school system demonstrate that canceling class on a religious holy day is indeed designed to promote educational efficiency rather than to endorse religion.

D. Section 7-103 violates the Establishment Clause.

The first step in Establishment Clause analysis is to determine whether the challenged statute facially prefers one religion over others. *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 695 (1989). If so, the reviewing court must subject the statute to strict scrutiny. *Larson*, 456 U.S. at 246.

Section 7-103 requires public schools to close from the Friday before to the Monday after Easter. It thus mandates public school holidays for Good Friday and Easter Monday. Such a statute provides a benefit to adherents of the Christian religion. Good Friday is an inherently religious event commemorating Jesus's crucifixion. Non-Christians do not celebrate Good Friday as either a religious or secular holiday. Section 7-103 designates no non-Christian holy days as public school holidays. Accordingly, it facially prefers the Christian faith. It must therefore be subjected to strict scrutiny.

A statute will be upheld under the strict scrutiny standard only if "it is justified by a compelling governmental

interest" and "is closely fitted to further that interest." *Larson*, 456 U.S. at 247. According to the Attorney General of Maryland, "The purpose of the section declaring public school holidays is to have uniformity throughout the State public schools on days that schools will not be in session." J.A. 180. This concern over uniformity, however, is belied by actual practice. Of Maryland's 24 public school systems, MCPS was one of only six that scheduled its 1997 spring break from March 28 to April 4. J.A. 173. The 24 school systems observed a total of six different spring break periods in 1997. *Id.* The dates of the first day of school, Thanksgiving break, winter break, the last day of school, and additional school closings and holidays also varied from jurisdiction to jurisdiction. *Id.* In fact, no two Maryland school systems had identical calendars for the 1996-97 school year. *Id.* This conclusively demonstrates that calendar uniformity is not a compelling state interest. Thus, the sole reason that Maryland's highest legal officer advanced in support of § 7-103 does not withstand strict scrutiny.

Section 7-103 also fails all three prongs of the *Lemon* test. There can be little doubt that in 1865, when the General Assembly first made Good Friday a public school holiday, 1865 Md. Laws 269, it intended to endorse a Christian holy day. Since 1865, no secular purpose has arisen to supplant that initial motivation. *Cf. McGowan v. Maryland*, 366 U.S. 420 (1961). No evidence exits that concerns over pedagogical or economic efficiency ever motivated the General Assembly or, even now, have any basis in fact. Accordingly, endorsement of a Christian holy day remains the primary purpose of making Good Friday a mandatory public school holiday.

The Good Friday public school holiday's primary effect is also the promotion of the Christian faith. By making a purely Christian holy day a mandatory public school holiday, the General Assembly communicates to public school students, their families, and school employees that adherents of the majority religion are entitled to state recognition and accommodation to which members of minority religions are not.

The holiday violates *Lemon*'s third prong as well. Section 7-103 requires that public schools close the Friday before and Monday after "Easter." This requires public officials to decide when Easter falls, which is a longstanding matter of religious controversy between the Western and Eastern Orthodox Christian denominations. *See generally* 4 ENCYCLOPEDIA OF RELIGION 557 (Mircea Eliade ed. 1987). In 1997, all 24 Maryland public school systems scheduled holidays on March 28 and 31, the Friday before and Monday after the Western churches' Easter. J.A. 173. None scheduled holidays on both April 25 and 28, the Friday before and Monday after the Eastern Orthodox churches' Easter. *Id.* Maryland's public school officials thus recognize the date on which Roman Catholics and Protestants celebrate Easter as the "official" Easter, while providing no such recognition to the date on which the Eastern Orthodox church celebrates Easter. The Court has emphasized that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. Regardless of how Maryland public school officials come up with the date for "Easter," they have placed the government's imprimatur on the Western Christian denominations' Easter over that of the Eastern Orthodox denominations. By forcing governmental

officials to make such a determination, § 7-103 violates *Lemon*'s third prong.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

EUGENE R. FIDELL
(*Counsel of Record*)
FELDESMAN, TUCKER, LEIFER
FIDELL & BANK LLP
2001 L Street, N.W.
Washington, DC 20036
(202) 466-8960

DWIGHT H. SULLIVAN
AMERICAN CIVIL LIBERTIES
UNION OF MARYLAND
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES
UNION OF THE NATIONAL
CAPITAL AREA
1400 20th Street, N.W.
Washington, DC 20036
(202) 457-0800

Attorneys for Petitioner

November 1999

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JUDITH M. KOENICK,
Plaintiff-Appellant,

v.

REGINALD M. FELTON, President,
Board of Education of Montgomery
County; PAUL VANCE,
Superintendent of Schools,
Montgomery County Public
Schools,
Defendants-Appellees. No. 97-1935

THE AMERICAN JEWISH CONGRESS;
NATIONAL COUNCIL ON ISLAMIC AFFAIRS;
FREEDOM FROM RELIGION FOUNDATION;
AMERICANS UNITED FOR SEPARATION OF
CHURCH AND STATE; AMERICANS FOR
RELIGIOUS LIBERTY; AMERICAN HUMANIST
ASSOCIATION; THE AMERICAN ETHICAL UNION,
Amici Curiae.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Alexander Williams, Jr., District Judge.
(CA-96-3111-AW)

Argued: December 1, 1998
Decided: August 20, 1999
Before ERVIN and MOTZ, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Ervin wrote the opinion, in which Judge Motz and Senior Judge Butzner joined.

COUNSEL

ARGUED: Eugene Roy Fidell, FELDESMAN, TUCKER, LEIFER, FIDELL & BANK, Washington, D.C., for Appellant. Stuart Henry Newberger, CROWELL & MORING, L.L.P., Washington, D.C., for Amici Curiae. Roger Warren Titus, VENABLE, BAETJER & HOWARD, L.L.P., Rockville, Maryland, for Appellees. **ON BRIEF:** Dwight H. Sullivan, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, Baltimore, Maryland; Arthur B. Spitzer, AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, Washington, D.C., for Appellant. Bradley S. Albert, CROWELL & MORING, L.L.P., Washington, D.C.; Harvey Reiter, Marc D. Stern, AMERICAN JEWISH CONGRESS, Washington, D.C.; G. Arthur Robbins, MCNAMEE, HOSEA, JERNIGAN & KIM, P.A., Greenbelt, Maryland; Steven K. Green, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Washington, D.C., for Amici

Curiae. Kevin B. Collins, VENABLE, BAETJER & HOWARD, L.L.P., Rockville, Maryland, for Appellees.

OPINION

ERVIN, Circuit Judge:

Judith M. Koenick ("Koenick"), a former public school teacher, filed this § 1983 action against the Board of Education of Montgomery County, Maryland ("the Board") challenging the constitutionality of a Maryland statute which provides for public school holidays on the Friday before Easter through the Monday following. Koenick argued that the holiday statute's enforcement amounted to an impermissible establishment of religion in violation of the First Amendment's Establishment Clause.[1] Both parties filed summary judgment motions in district court. The court awarded summary judgment in favor of the Board and Koenick appealed. Because we agree with the district court that this statute does not violate the Establishment Clause, we affirm.

I.

Under Maryland law, public schools must create their annual school calendar in accordance with Md. Code Ann., Educ. § 7-103 (1996). Subsection (c) of § 7-103 provides for

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[1] Just prior to oral argument, this Court was notified that Koenick was no longer employed as a public school teacher in Montgomery County. We find, therefore, that Koenick lacks standing to pursue her equal protection claim and do not address it herein.

public school holidays on Thanksgiving, Christmas Eve through January 1, the Friday before Easter through the Monday after, Memorial Day, and primary and general election days.[2]

As authorized, the Board adds additional holidays to those listed in § 7-103(c), including Martin Luther King, Jr. Day, President's Day, Independence Day, Labor Day, Yom Kippur, and Rosh Hashanah. The Board decided to include Yom Kippur and Rosh Hashanah to the list of holidays because high absenteeism among both teachers and students on those days resulted in low instructional productivity and increased costs for substitute teachers. The Board also builds into the calendar an annual spring vacation by adding four more vacation days to the beginning of or at the end of the statutory four-day break over Easter weekend mandated by § 7-103(c)(1)(iii). In creating the annual calendar, the Board attempts to schedule the ten-day spring vacation so that it coincides with Passover to lower absenteeism, but that is not always possible. The official school calendar indicates that from the Friday before Easter to the Monday after Maryland public schools are closed for "Easter."

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[2] Section 7-103(c) provides in relevant part:

(c) *Holidays.* — (1) The following days are public school holidays:

(i) Thanksgiving Day and the day after;
(ii) Christmas Eve and from then through January 1;
(iii) The Friday before Easter and from then through the Monday after Easter;
(iv) Memorial Day; and
(v) Primary and general election days.

Md. Code Ann., Educ. § 7-103(c) (1996).

On October 3, 1996, Koenick filed this action *pro se* against the President and Superintendent of the Board alleging that the Board's recognition and enforcement of § 7-103(c)(1)(iii), which provides for a school holiday from the Friday before Easter to the Monday after, violated the Establishment Clause. A period of discovery followed during which Koenick retained counsel. At the close of discovery, Koenick moved to file an amended complaint and to add additional State officials as defendants. The district court allowed the filing of an amended complaint but denied her request to add defendants. Additional discovery followed the filing of the amended complaint, after which the parties filed cross-motions for summary judgment.

The district court granted summary judgment in favor of the Board, denying Koenick's claims that § 7-103(c)(1)(iii) violated the Establishment Clause. Rejecting Koenick's argument that because § 7-103(c)(1)(iii) facially prefers one religion over another, the Maryland statute should be subject to strict scrutiny under *Hernandez v. Commissioner*, 490 U.S. 680 (1989), the district court applied the three-part test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("the *Lemon* test"). Under the *Lemon* test, the district court found the statute constitutional because it had a secular purpose, its principal or primary effect was not to advance or inhibit religion, and it did not foster an excessive entanglement between church and state.

The district court acknowledged that the Supreme Court had recently suggested other tests for analyzing the constitutionality of statutes under the Establishment Clause and also that other Circuit courts had found similar statutes

unconstitutional, but declined to apply the reasoning of these courts in this case. Koenick appealed the ruling.

We review the district court's grant of summary judgment *de novo*. *See Brogan v. Holland*, 105 F.3d 158, 161 (4th Cir. 1997). We must affirm if the case presents no genuine issues of material fact and the Board is entitled to a judgment as a matter of law. *See Roe v. Doe*, 28 F.3d 404, 406 (4th Cir. 1994). All reasonable inferences are to be drawn in favor of the non-movant, Koenick. *See id.* at 407.

II.

Koenick alleges that § 7-103(c)(1)(iii) violates the Establishment Clause of the First Amendment of the Constitution, as applied to the states by the Fourteenth Amendment. The Establishment Clause provides that "Congress shall make no law respecting the establishment of religion." U.S. Const. amend. I. To evaluate Koenick's claim, therefore, we must venture into the often-dreaded and certainly murky area of Establishment Clause jurisprudence. As an initial matter, however, we must determine whether Koenick has standing to bring this suit.

A.

Just prior to oral argument, Koenick applied for retirement from the Montgomery County Public School system. She requested that her retirement pay commence on December 1, 1998, the exact date of oral argument in this case. This Court was made aware of Koenick's change in employment status in a letter from the Board's counsel wherein the Board argued that this issue mooted Koenick's

appeal because she no longer had standing to file her appeal. In a response letter, Koenick's counsel conceded that, without being a teacher, Koenick lacked standing to bring her equal protection claim, but that as a taxpayer and citizen of Montgomery County and the State of Maryland she retained standing to pursue her Establishment Clause claim.

Article III, § 2 of the Constitution requires that judicial resources be spent only in the resolution of Cases or Controversies. Part of this case-or-controversy hurdle requires that the litigants have standing to sue or defend. *See Arizonians for Official English v. Arizona*, 520 U.S. 43, 64 (1997). To prove standing, a party must show "an invasion of a legally protected interest" that is "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An interest shared with the public at large is not sufficient; *see id.* at 573-76, the litigant must allege a direct injury, such as being subjected to an unwelcome intrusion of religion. *See Suhre v. Haywood County*, 131 F.3d 1083, 1086-87 (4th Cir. 1997).

The seminal taxpayer standing case is *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), in which the Supreme Court explained that a taxpayer has standing to challenge a statute when he is able to show that he "has sustained or is immediately in danger of sustaining some direct injury as a result of [the challenged statute's] enforcement." *Id.* at 434 (citations omitted). Such a direct injury has been found when the challenged statute involves the expenditure of state tax revenues. *See Cammack v. Waihee*, 932 F.2d 765, 769 (9th Cir. 1991). This principle has been interpreted to justify finding that a municipal taxpayer has standing in cases where the litigant's only injury is the alleged improper expenditure of municipal funds. *See id.* at 770 ("[W]e

conclude that municipal taxpayer standing simply requires the 'injury' of an allegedly improper expenditure of municipal funds. . . .").[3]

Applying this standard, Koenick has standing as a taxpayer in Montgomery County. In her complaint, Koenick alleges that she is injured by the expenditures of her tax revenues towards the paid holiday on the Friday before and the Monday after Easter for public school employees. It is undisputed that these tax revenues fund the public school system in the County and thereby fund the paid, statutory holidays for school employees such as that required by § 7-103(c)(1)(iii). Because Koenick is a taxpayer who indirectly bears the burden of funding a paid public school holiday around Easter, we find that she has standing to pursue her appeal.

B.

Having found that Koenick has standing to bring this Establishment Clause claim, we turn our attention to the merits of her appeal.

There is little confusion over the general concept behind the Establishment Clause; that it "was intended to erect a wall of separation between Church and State." *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (citation omitted). There is much confusion, however, about how to apply this broad principle in specific cases. Traditionally,

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[3] Although they concerned the display of religious symbols in public settings, in both *Suhre v. Haywood County*, 131 F.3d at 1086, and *Smith v. County of Albemarle*, 895 F.2d 953, 955 (4th Cir. 1990), we applied an even more permissive standard, finding that noneconomic or intangible injuries may suffice to render an Establishment Clause claim justiciable. *See Suhre*, 131 F.3d at 1086; *Smith*, 895 F.2d at 955.

Establishment Clause cases have been evaluated using the *Lemon* test set out in *Lemon*.[4] In more recent Establishment Clause cases, however, the Supreme Court has employed several different tests presented as either glosses on or replacements for the *Lemon* test;[5] therein lies the confusion as to the applicable standard.

In the instant case, Koenick argued that § 7-103(c)(1)(iii) created a facially unconstitutional denominational preference and therefore should be subjected to strict scrutiny. *See Hernandez*, 490 U.S. at 695 (ruling that "when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*.") (citations omitted).

The district court properly rejected the applicability of strict scrutiny in this case. Strict scrutiny in the

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[4] The *Lemon* test provides that:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster an excessive government entanglement with religion.

Lemon, 403 U.S. at 612-13 (citation omitted).

[5] *See Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 695 (1989) (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982), which holds that facial denominational preferences are evaluated under strict scrutiny); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (endorsement test); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (coercion test); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 839-41 (1995) (neutrality test).

Establishment Clause context is to be used to evaluate only those statutes that facially discriminate between religious denominations or between religion and non-religion. *See Hernandez*, 490 U.S. at 695. *See generally Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1346-49 (4th Cir. 1995) (Luttig, J., concurring). For example, if § 7-103(c)(1)(iii) provided for a holiday only for followers of the Christian faith on the days around Easter, it would, on its face, discriminate between denominations and be subject to strict scrutiny. But it does not. Instead, the statute provides an annual holiday for all Montgomery County public school students from which all students benefit equally and thereby does not facially discriminate against any denomination. We find, therefore, that § 7-103(c)(1)(iii) does not include a facial denominational preference and thus should not be subjected to strict scrutiny.

Finding that the instant case does not trigger strict scrutiny is only the beginning of the inquiry, however. The question remains as to what standard or test should be applied here. Heeding our conclusion in *Barghout*, that "until the Supreme Court overrules *Lemon* and provides an alternative analytical framework, this Court must rely on *Lemon* in evaluating the constitutionality of legislation under the Establishment Clause," 66 F.3d at 1343 n.11, the district court applied the *Lemon* test. We agree.

We conclude that the more recent Supreme Court cases have not, "by implication, overruled an earlier precedent," *Agostini v. Felton*, 521 U.S. 203, 237 (1997), and that the general principles we have relied on to evaluate Establishment Clause claims have not substantively changed since the *Lemon* line of cases was decided. *See Agostini*, 521

U.S. at 222-23 ("To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed.").[6] On that basis, we will continue to evaluate Establishment Clause cases using the *Lemon* test. *See Granzeier*, 173 F.3d at 573 (finding the endorsement test was a clarification of the second prong of the *Lemon* test and not a completely different analysis); *Bridenbaugh*, 1999 WL 517169, at *2 (interpreting *Agostini* as reaffirming the continued viability of the three-part *Lemon* test). *See generally Columbia Union College v. Clarke*, 159 F.3d 151, 158-59 (4th Cir. 1998) (citing *Agostini* for the proposition that the Supreme Court warned lower courts against finding that the Court had implicitly overruled its prior precedent).

C.

In *Lemon*, the Supreme Court created a three-part test for determining whether a state action violates the Establishment Clause. It required that the state action possess a secular purpose, that the action's primary effect was not the advancement of religion, and that it did not

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[6] In *Agostini*, the Court reaffirmed its commitment to evaluating Establishment Clause cases using the same factors considered under the *Lemon* test. *See id.* at 222-23, 232. The only explicit shift was in recognizing that the factors used "to assess whether an entanglement is excessive are similar to the factors we use to examine effect." *Id.* at 232 (emphasis deleted). *Agostini* also suggests that in some contexts the entanglement inquiry be considered an aspect of the second "effect" prong. *See id.* at 232-35. Like our sister circuits, however, we believe that in the present context the two inquiries are best considered separately. *See Bridenbaugh v. O'Bannon*, No. 98-3058, 1999 WL 517169, at *2 (7th Cir. July 21, 1999); *Granzeier v. Middleton*, 173 F.3d 568, 572-76 (6th Cir. 1999).

result in an excessive entanglement between church and state. *See Lemon*, 403 U.S. at 612-13 (citation omitted). If a state action violates even one of these three prongs, that state action is unconstitutional. *See North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147 (4th Cir. 1991).

Three other circuits have considered the question of whether the creation of a statutory holiday around Easter violates the Establishment Clause. In *Cammack*, the Ninth Circuit reasoned that since Good Friday has become secularized in Hawaii, the state could declare it a holiday without violating the Establishment Clause. 932 F.2d at 769. In *Bridenbaugh*, the Seventh Circuit examined an Indiana statute declaring Good Friday a paid holiday for state employees. 1999 WL 517169. After finding that Indiana presented several legitimate secular purposes for the holiday, none of which had the effect of advancing religion, the court ruled the Good Friday holiday statute constitutional. *See id.* at *7. Finally, in *Granzeier*, the Sixth Circuit found that a statute closing various courts and administrative offices on Good Friday was not unconstitutional because it was enacted for the legitimate, secular purpose of giving state and county employees the day off on a convenient and low traffic day. 173 F.3d at 574-76.

1.

To be constitutional, a state action must have a "clearly secular purpose." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). It need not, however, be entirely secular, *see id.*, but if there is no evidence of a legitimate, secular purpose,

then the statute must fail. *See Lynch*, 465 U.S. at 690. We are "reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute," *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983), but "it is required that the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987). When determining whether a statute retains a secular purpose, we look not to the purpose of the statute when enacted, but at its contemporary purpose. *See McGowan v. Maryland*, 366 U.S. 420, 431 (1961).

As we noted in *Barghout*, the "first prong [of the *Lemon* test] . . . is a fairly low hurdle," 66 F.3d at 1345, one we believe § 7-103 clears. The Board contends that closing schools on the Friday before and the Monday after Easter is necessary because of the high rate of absenteeism expected on these days among students and teachers. Such absences, it argues, disrupt the effectiveness of instruction and require an increased monetary outlay for the hiring of substitute teachers, wasting valuable and limited educational resources. Bolstering its argument, the Board insists that this is the same reason it closes schools on the Jewish holidays of Yom Kippur and Rosh Hashanah.

The district court was persuaded that § 7-103(c)(1)(iii) was supported by this contemporary, pragmatic, secular purpose and so are we. The Board's desire to economize scarce educational resources that are wasted when classes are held on days with a high rate of absenteeism provides a plausible secular purpose for closing school for a four day holiday around Easter. Therefore, we are persuaded that § 7-103 has a contemporary and

legitimate secular purpose sufficient to satisfy the first prong of the *Lemon* test.

Koenick argued that although there was actual evidence supporting the Board's decision to close school for the aforementioned reasons on the two Jewish holidays, there was no comparable evidence to support closing around Easter. She suggested that a simple survey could be taken to show how many students intend to be absent on these days; without which Koenick argued, there is no evidence that such factors justify the granting of this holiday.

We find this suggestion untenable. This statutory four-day holiday around Easter has been a part of the Montgomery County Public School Calendar for 130 years. It has become part of the school community's expectations and plans, and because it is also the anchor around which the longer spring vacation is scheduled, such a survey would probably yield the exact results the Board asserts, if for no other reason than that people expect to have these days off and have planned accordingly. We do not believe that the Board should be required to conduct such a survey to show that high absenteeism and decreased instructional effectiveness would result from holding classes on the days surrounding Easter weekend. We are persuaded that the four-day holiday around Easter is supported by a pragmatic,

legitimate, secular purpose.[7]

2.

Having found that § 7-103(c)(1)(iii) has a secular purpose and satisfies the first prong of the *Lemon* test, we consider whether the statute satisfies the second prong. With this prong, we must determine if § 7-103(c)(1)(iii) has the principal or primary effect of advancing or inhibiting religion. The Government may, through speech and actions, recognize religion or a religious holiday, *see Lynch*, 465 U.S. at 676, but it may not overtly endorse a religion, or religion in general. *See Capitol Square Review and Advisory Bd. v.*

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[7] We note that we find nothing in the record or otherwise that indicates that Easter, the holiest day in all of Christendom, is, as the district court concluded, "a highly secularized holiday." The anecdotal evidence in the record before us concerning the secularization of Easter proves nothing. Neither Koenick's reliance on the deeply religious aspects of Easter for practicing Christians nor the Board's recitation of the many seemingly secular events surrounding the day evidence the level of secularization of the holiday. *See Lynch v. Donnelly* , 465 U.S. 668, 675, 685-86 (1984) (Christmas does not have to lose its religious significance for believers in order to be considered a secular holiday); *County of Allegheny v. ACLU*, 492 U.S. 573, 633 (1980) (O'Connor, J., concurring) ("The Easter holiday celebrated by Christians may be accompanied by certain 'secular aspects' such as Easter bunnies and Easter egg hunts; but it is nevertheless a religious holiday."). What is necessary to prove Easter's secularization is evidence of the numbers of persons who observe the holiday in a purely secular way — that is, the number of persons for whom the holiday has no religious significance but who nonetheless celebrate the occasion in some manner. *See, e.g., County of Allegheny*, 492 U.S. 585, 616-17 (noting that many Americans have a Christmas tree in their home or otherwise celebrate Christmas or Chanukah "without regard to [their] religious significance"). This record is devoid of such evidence. Accordingly, unlike the district court, we do not base our holding on a finding that Easter is a secular holiday.

Pinette, 515 U.S. 753, 764-65 (1995). A statute whose primary effect is to advance a secular purpose, rather than a religious one, is still constitutional even if it conveys an incidental benefit to those of a specific religion. *See McGowan*, 366 U.S. at 445; *Lynch*, 465 U.S. at 683 ("[N]ot every law that confers an indirect, remote, or incidental benefit upon [religion] is, for that reason alone, constitutionally invalid.") (citations omitted). Koenick argued that by establishing a four-day holiday around Easter, the statute has the effect of advancing and endorsing Christianity over other faiths. We cannot agree. Section 7-103 provides a four-day holiday for all of the Montgomery County public school children and teachers, not just followers of Christianity. By expressing no preference toward the practitioners of any one faith over any other, the four-day holiday around Easter does not endorse or advance a particular religion or religion generally. Section 7-103(c)(1)(iii) does not grant an added benefit to members of one faith that it does not grant to everyone, but rather treats all of the affected parties the same with respect to religion, and thereby does not impermissibly advance religion.

Further, by simply giving students and teachers a school holiday around Easter, § 7-103 does not mention or imply that the holiday is to be spent attending religious services in recognition of this Christian holy day. The statute merely gives people the days off to spend as they like. Although the statute makes it possible for students and teachers to attend services around Easter, it in no way promotes or advances this cause. Similarly, the Board has a policy of granting students and teachers excused absences to attend religious services in recognition of holy days in their

own religions; however, by doing so there is no insinuation that such a policy advances any religion over another. *See Granzeier*, 173 F.3d at 575-76 (finding that when school districts with a large Jewish population close school for Jewish holy days it does not result in the impermissible establishment of the Jewish religion but rather constitutes a secular recognition of the practicalities of school attendance).

Koenick also argued that, by making the Friday before and the Monday after Easter a holiday, § 7-103 makes it easier for Christians to practice their faith than for others, thereby advancing Christianity. We disagree.

The Supreme Court has stated repeatedly that a statute does not automatically violate the Establishment Clause simply because it confers an incidental benefit upon religion. *See Lynch*, 465 U.S. at 683. Koenick is essentially arguing that followers of the Christian faith receive an incidental benefit because § 7-103 makes their observance of Good Friday easier, and disregarding the fact that all of the other students benefit equally from the four-day holiday. As stated by the Court, that is not enough to render § 7-103 invalid on grounds that it impermissibly advances religion. Because all Montgomery County students and teachers benefit equally from the four-day holiday and because the statute does not encourage or require students to attend religious services, we do not believe that § 7-103 runs afoul of the second prong of the *Lemon* test.

3.

Finally, to satisfy the third prong of the *Lemon* test we must determine whether this statute leads to an

"excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. The Supreme Court has held that "[e]ntanglement is a question of kind and degree," *Lynch*, 465 U.S. at 684, and because some interaction between church and state is inevitable, the Supreme Court has reaffirmed that the "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini*, 521 U.S. at 233.

In the past, the Supreme Court has found excessive entanglement in cases involving a state salary supplement to teachers in parochial schools. *See Lemon*, 403 U.S. at 615-22. In contrast, in *Agostini*, the Court found that a federally funded program where public school teachers provide remedial instruction to children in parochial schools on a neutral basis did not result in an excessive entanglement of government with religion. 521 U.S. at 233-35. *See also Lynch*, 465 U.S. at 684 (finding that because no city money was spent to maintain a challenged creche display, and no contact between the city and the church was required, there was no impermissible enduring entanglement of church and state). Koenick argued that § 7-103(c)(1)(iii) implicitly involves the Board in religious matters by requiring it to participate in an ongoing, intra-faith controversy over the actual date on which Easter is to be celebrated annually. Koenick reasons that, by enforcing § 7-103(c)(1)(iii), the Board has become embroiled in a religious controversy between the Roman Catholic and Protestant Christian denominations and the various Eastern Orthodox denominations who celebrate Easter on different days; she insists that because the statute does not define Easter, every year the Board has to calculate when the holiday occurs and

that determination constitutes an excessive entanglement. We disagree.

The Board showed that it consults commercially printed calendars to determine the date of Easter each year. This task certainly causes the Board to interact with religion, but it does not constitute an excessive entanglement. The Board does not have to consult with the Catholic or Protestant Churches to determine the date of Easter each year. Nor is it required to be involved in any church-related activities or provide any funding for churches or religious events. In *Agostini*, the Court ruled that even programs where public school teachers were paid with federal funds to teach disadvantaged children in parochial schools did not cause an excessive entanglement between church and state. *See* 521 U.S. at 234-35. Given the *Agostini* standard, and the lack of evidence that § 7-103(c)(1)(iii) creates any entanglement between the Board and any religion, we find that the provision of a four-day holiday around Easter does not cause the Board to become impermissibly and excessively entangled with religion.

III.

In summary, the Board's recognition and enforcement of § 7-103 does not run afoul of any of the factors set out in the *Lemon* test: It is supported by a pragmatic, legitimate, secular purpose, it does not advance or inhibit religion, and it does not result in an excessive entanglement with religion.

For the foregoing reasons, we agree that Md. Code Ann., Educ. § 7-103(c)(1)(iii) does not violate the Establishment Clause of the First Amendment. The

judgment of the district court is thereby

AFFIRMED.

APPENDIX B

IN THE UNITED STATE DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JUDITH M. KOENICK, Plaintiff,

v.

REGINALD M. FELTON, et al., Defendants.

Civil Action No. AW-96-3111.

July 2, 1997.

MEMORANDUM OPINION

Before the Court are Cross-Motions for Summary Judgment filed by Plaintiff and Defendants. A hearing on these Motions was held on June 30, 1997. The Court has considered the arguments presented in the written submissions and at the hearing and has studied the relevant case law. Accordingly, the Court has determined that summary judgment for the Defendants is appropriate.

Background

This case surrounds the constitutionality of a Maryland statute providing for a public school holiday from "[t]he Friday before Easter and from then through the Monday after Easter," Md. Educ. Code Ann. § 7-103(c)(1)(iii) (hereafter "§ 7-103"). Plaintiff is a teacher

employed by the Board of Education of Montgomery County, and she is Jewish. Plaintiff asserts that when she "has observed certain days of Passover—an important Jewish holiday—as religious holidays, she has been required to use personal leave days or leave without pay" from her employment.[1] Revised Second Amended Complaint at 4.

In Count I of the Revised Second Amended Complaint, Plaintiff alleges that § 7-103 violates the Establishment Clause of the First Amendment of the U.S. Constitution, as applied to the states by the Fourteenth Amendment. In Count II, she alleges that the statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Summary Judgment Principles

Summary judgment is appropriate when there is no genuine dispute of material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celeotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citations omitted). *See also Bland v. Norfolk and Southern Railroad Co.*, 406 F.2d 863, 866 (4th Cir. 1969).

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[1] As discussed later in this Memorandum Opinion, the school calendar for Montgomery County provides for school closings on the Jewish holidays of Yom Kippur and Rosh Hashanah, but does not provide for school closing during Passover.

In determining whether genuine and material factual disputes exist, resolution of which requires trial, the Court has reviewed the parties' memoranda and the many exhibits attached thereto. In considering each of the respective Motions for Summary Judgment, the Court has construed all facts, and all reasonable inferences drawn therefrom, in the light most favorable to the non-moving party. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Applying these principles to this case, the Court concludes that summary judgment for the Defendants must be granted.

Discussion

I. Establishment Clause

Count I of Plaintiff's Complaint alleges that § 7-103 violates the Establishment Clause of the First Amendment of the U.S. Constitution, as applied to the states by the Fourteenth Amendment. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion...," and this provision binds the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

A. The Question of Applicable Standard

Plaintiff's interpretation of Establishment Clause jurisprudence is that if a statute facially prefers one religion over others, it should be subject to strict scrutiny. Otherwise, Plaintiff argues, the statute should be subject to

the three-part test set forth in *Lemon v. Kurtzman*, 402 U.S. 602 (1971). In espousing the interpretation of the case law, Plaintiff relies heavily on *Hernandez v. Comm'r of Internal Revenue*, 490 U.S 680, 695 (1989). In *Hernandez*, the U.S. Supreme Court rejected an Establishment Clause challenge to an IRS determination regarding the charitable contribution status of payments made to the Church of Scientology in return for religious services. In framing its analysis, the Court provided the following guidance:

> when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman.*

Herndandez, 490 U.S. at 695.

However, it is not clear that this *Hernandez* approach should precede and potentially preempt the analysis of Establishment Clause challenges through the prism of the *Lemon* test. In response to the somewhat unclear dictates of Establishment Clause jurisprudence, the Fourth Circuit recently stated that "until the Supreme Court overrules *Lemon* and provides an alternative analytical framework, this Court must rely on *Lemon* in evaluating the constitutionality of legislation under the Establishment Clause." *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1342 n.11 (4th Cir. 1995). Moreover, as Defendant has argued and as neither Plaintiff nor the Court's own research has refuted, no case has ever applied this strict scrutiny test in the context of an Establishment Clause challenge to government recognition of

holidays that were once or now are religiously based. Hence, analysis of this case through the *Hernandez* lens appears inappropriate.

Furthermore, even if this Court were to apply *Hernandez*, the Court would conclude that this case does not qualify for strict scrutiny under the *Hernandez* analysis. Consequently, the *Lemon* test will govern in this case regardless of the applicability of *Hernandez*. In reaching this conclusion, the Court has considered Plaintiff's argument that the statute constitutes a facial preference because "Section 7-103 aids only one religion." Plaintiff's Opposition and Cross-Motion for Summary Judgment at 10. The Court has also weighed Plaintiff's claim that the statute creates an unconstitutional denominational preference between Christianity and other religions, as well as between Eastern and Western Christianity (which do not identify the date of Easter in the same manner).

However, the Court has concluded that these arguments must fall because they are premised on an incorrect conception of Easter. As the Defendants note, Easter itself is a highly secularized holiday. With reference to the similarly secularized holiday of Christmas, the U.S. Supreme Court has noted that "[t]he Christmas holiday in our national culture contains both secular and sectarian elements." *Lynch v. Donnelly*, 465 U.S. 665, 709 n.15 (1984). The statutory vacation provided by § 7-103 surrounds Easter. Not only does § 7-103 fail to mention "Good Friday," but it also provides a vacation day on the Monday after Easter, a day with no religious significance. Consequently, the Court believes that § 7-103 would fall short of receiving strict scrutiny review under the *Hernandez* standard even if that standard were applicable.

The proper frame of analysis for this Establishment Clause challenge is the three-part test set forth by the U.S. Supreme Court in *Lemon v. Kurtzman*.

B. The Three-Part *Lemon* Test

In *Lemon v. Kurtzman*, the Supreme Court set forth a three-part test for determining whether a state action violates the Establishment Clause. As explained in *Lemon*, in order for a state action to be in compliance with the Establishment Clause, it must:

(1) have a secular purpose;
(2) have the principle or primary effect of neither advancing nor inhibiting religion; and
(3) not foster an excessive entanglement with religion.

Lemon, 403 U.S. at 612-613. *See also North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1147 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992) (If a state action violates even one of the three prongs of the *Lemon* test, that state action is unconstitutional.)

In reviewing the record in this case, the Court has concluded that the first prong of the *Lemon* test is satisfied. As Defendants have argued, the high number of students and teachers who would be absent on the Friday and Monday surrounding Easter would disrupt the effectiveness of instruction and would require monetary outlay for the hiring substitute teachers. Defendant has explained that it is for this same reason that the Jewish holidays of Yom Kippur and Rosh Hashanah are excluded from the school calendar if

they fall on weekdays. *See* Memorandum in Support of Defendants' Motion for Summary Judgment at 5, n.8 and Exhibits 7 and 8.

Plaintiff and the Amicus argue that although there is evidence supporting the decision to close school for the aforementioned reason on these Jewish holidays, there is no comparable evidence to support the closing for the days specified in § 7-103. This argument is specious, because schools have been closed on the days specified in § 7-103 since the establishment of organized public schools in Maryland more than 130 years ago, and thus it has not been possible to collect such data. The Court is sufficiently persuaded that these closings are supported by the same pragmatic secular purposes as the closings for Jewish holidays, because the Christian population in Maryland is almost ten times the state's Jewish population.[2]

Although closing school on such days may also have the effect of accommodating religion, the U.S. Supreme Court has stated repeatedly that a statute is not automatically a violation of the Establishment Clause merely because it has the effect of accommodating religion. The Supreme Court has advised that Courts must be reluctant "to attribute unconstitutional motives to the states, particularly when a plausible secular purpose ... may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). *See also Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987).

Furthermore, as noted above, Easter has become a secularized holiday in our society, such that recognition of it

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[2] As Defendants point out in their Reply Memorandum, "while 4.3% of Marylanders are Jewish, nearly 44% of Marylanders are Christians. *See* Defendants' Reply Memorandum at 11 and Exhibits 18 and 19.

is consistent with a secular purpose. Although Plaintiff argues that the purpose of the statute is to recognize "Good Friday" as a holiday (rather than simply Easter), this argument does not jibe with the statute's inclusion of the Monday after Easter as well, because that Monday holds no religious significance.

Having established that § 7-103 satisfies the first prong of the *Lemon* test, the Court proceeds to the second prong of the test: whether the statute has the primary effect of advancing or inhibiting religion. The Court has concluded that this prong of the *Lemon* test is also satisfied. By giving students and teachers a long weekend surrounding Easter, the statute does not require or even encourage people to attend religious services for Good Friday. The statute makes possible the attendance of such services, but state law also excuses students' and teachers' absences for the holidays of their religions. *See* Memorandum in Support of Defendants' Motion for Summary Judgment at 17 and Exhibits 6 and 16.

Plaintiff cites case law from outside the Fourth Circuit suggesting that a school holiday on Good Friday violates this second prong of the *Lemon* test. However, the Court practice must heed the dictates of the Fourth Circuit, which has stated that "[e]very government practice must be judged in its unique circumstances to determine whether it [endorses] religion." *Barghout*, 66 F.3d at 1345 (quoting *Lynch*, 465 U.S. at 694 (O'Connor concurring)). As explained above, the Court has concluded that this specific statute does not constitute an endorsement or advancement of religion. Rather, the effect of the statute appears to be the pragmatic secular purpose outlined above. The various

cases from courts in other Circuits that Plaintiff cites bear no relevance to this determination.

Indeed, this case can be analogized to the U.S. Supreme Court's analysis of Maryland's Sunday closing laws, in *McGowan v. Maryland*, 366 U.S. 420 (1961). In *McGowan*, the Supreme Court determined that Maryland's Sunday closing laws did not violate the Establishment Clause, regardless of whether they originated in religiosity, because those laws have the overriding purpose of giving citizens a uniform day of rest. Similarly, the long weekend surrounding the largely secularized holiday of Easter not only serves the ends of pragmatism and efficiency in school administration, but also provides an anchor for the yearly spring break enjoyed by students and faculty. Hence, the secular effects of the statute at issue in this case clearly predominate.

Finally, the third prong of the *Lemon* test requires the Court to examine whether this statute causes excessive state entanglement with religion. The statute at issue in this case fosters little if any governmental entanglement with religion. The statute requires no participation in church-related activities and provides no funding for churches.

Supreme Court jurisprudence holds that "[e]ntanglement is a question of kind and degree." *Lynch*, 465 U.S. at 684-685. In *Lynch*, the Supreme Court held that there was no excessive entanglement as a result of the City of Pawtuckett's including a creche in the city's annual Christmas display. The Court based this conclusion on the absence of evidence of church involvement with the content or design of the creche, the absence of government expenditures for maintenance of the creche, and the fact that there was little or no interaction between the church and the

city officials managing the creche.[3] The reasoning of the *Lynch* Court is at least equally applicable to the immediate case. One might argue that the government is interacting with religion in consulting the calendar for the date of Easter, but this alone does not constitute sufficient governmental interaction with religion to qualify as "excessive entanglement." For these reasons, § 7-103 falls far afield of constituting excessive government entanglement with religion.

Hence, § 7-103 passes the *Lemon* test.

C. Alternate Establishment Clause Tests

In addressing the constitutionality of § 7-103, this Court will also address alternate Establishment Clause analyses that have been proposed by individual Supreme Court justices in recent years. In her concurrences in *County of Allegheny v. ACLU*, 492 U.S. 573, 623 (1989) and *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984), Justice O'Connor proposes a two-part "endorsement" test. The first prong of this test queries whether a state has "excessive entanglement" with religious institutions in a way that might interfere with the religious institutions' independence. *Lynch* at 687-88. The second prong of the test bars a state from "endorsing" or "disapproving" a religion. *Id.* at 688.

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[3] Indeed, the Supreme Court has only found excessive government entanglement in cases involving a substantial degree of interaction between church and state. In *Lemon v. Kurtzman*, for example, the Court found unconstitutional state statutes providing aid to church-related elementary and secondary schools and their teachers. The Court based this ruling on the fact that this required continuing and excessive oversight between the state and the church-related schools.

Although this test has not been broadly endorsed by the Supreme Court, it may prove helpful for this Court to apply its analysis to the present case. As discussed above with reference to the *Lemon* test, § 7-103 does not foster excessive governmental entanglement with religion, as addressed in the first prong of O'Connor's test. The second prong of the test forbids governmental endorsement or disapproval of religion. The Maryland statute at issue in this case also passes this prong of O'Connor's test. The statute does not grant any added benefit to members of one religion that it does not grant to everyone, as the four-day holiday surrounding Easter is conferred upon students and teachers irrespective of their religions. Likewise, students and teachers who do not recognize "Good Friday" suffer no negative consequences as a result. For these reasons, the long weekend surrounding the largely secularized holiday of Easter is neither an endorsement or a disapproval of a particular religion.

In *Lee v. Weisman*, 505 U.S 577 (1992), the Supreme Court majority applied yet another Establishment Clause test, this one propounded by Justice Kennedy. Under this test, a state action violates the Establishment Clause if the state action coerces someone to support or participate in religion. *Id.* at 587. Applying this test in *Lee v. Weisman* (the only case in which it has been applied by the Court's majority), the Court held that it was a violation of the Establishment Clause to include prayer in a graduation ceremony over a student's objections, as this required the student to conform to a state-sponsored religious activity in order to attend her graduation. *Id.* at 596. The Court held that this constituted the state's coercing the student to support a particular religion. *Id.*

The present case passes the coercion test. By providing a long weekend surrounding Easter, the County does nothing coercing students or teachers to attend religious services or to support any particular religion. Individuals may choose to attend such services as they wish, but nothing in § 7-103 coerces or even encourages them to do so.

The final alternative to the *Lemon* test has been espoused by the Supreme Court in two recent Establishment Clause decisions. In *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994) and *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), the Court did not rely on enumerated application of the *Lemon* test, but rather, it insisted that the state must remain neutral towards religion. In essence, this neutrality test prevents the state from favoring one religion over another or favoring religious adherents over nonadherents.

In the present case, this neutrality test is satisfied. As discussed above, Easter has become a secularized holiday, and § 7-103 simply provides a four day weekend surrounding Easter. Indeed, one of the vacation days provided by § 7-103, the Monday after Easter, has no religious significance. Furthermore, the statute at issue serves the pragmatic purpose of scheduling vacation days to coincide with days when there is a high probability of absenteeism. As note previously, this principle is also applied to days that would likely have high absenteeism because they are the days of particular Jewish holidays. Thus, the statute does not favor one religion over another.

Likewise, the statute does not favor adherents over non-adherents, because it applies equally to everyone. The four-day weekend surrounding Easter is provided to all

students and teachers, regardless of their religious beliefs or lack thereof. In these ways, § 7-103 easily satisfies the neutrality requirement espoused in recent Supreme Court jurisprudence.

Based on the foregoing analysis, the Court concludes that § 7-103 is not in violation of the Establishment Clause.

D. Case Law from other Circuits

Although the Fourth Circuit has not considered this issue, the Ninth and Seventh Circuits have considered matters with some similarity to the immediate case. Although these opinions are not binding on this Court, a review of them further elucidates the present case, and confirms the Court's conclusion that § 7-103 does not violate the Establishment Clause.

In 1991, the Ninth Circuit found constitutional a Hawaii statute declaring "Good Friday" a state holiday. *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991). Applying the *Lemon* test, the Court found that the first prong of the test did not require that the purpose be entirely secular. The Court explained that the prong is satisfied if a sincere secular purpose exists. The Court has noted the Supreme Court's recognition that mere accommodation of religion does not necessarily violate the Establishment Clause. *Cammack*, 932 F.2d at 776, citing *Hobbie*, 480 U.S. at 144-45.

Addressing the second prong of the *Lemon* test, the Ninth Circuit relied heavily on *McGowan v. Maryland*, 366 U.S. 420 (1961), in which the Supreme Court held Maryland's Sunday closing laws did not violate the Establishment Clause because they have grown to have the

neutral primary effect of giving citizens a uniform day of rest. The Ninth Circuit held that Good Friday had grown to hold a similar position for the citizenry. The Court addressed the third prong of the *Lemon* test relatively briefly, holding that the only potential entanglement was the state's use of the church's calendar, and that this did not constitute "excessive" entanglement under the jurisprudential norms.

Md. Educ. Code Ann. § 7-103 passes the *Lemon* test even more easily than did the provision before the Ninth Circuit. Because the statute before the Ninth Circuit specifically provided that "Good Friday" was a holiday (and did not provide any other, non-religious day surrounding the secularized Easter weekend as a holiday), it arguably appears to reflect religious purpose in a way that § 7-103 does not. For similar reasons, the Maryland statute even more clearly satisfies the second prong of the *Lemon* test. Because it does not specify "Good Friday," but rather provides two days of vacation surrounding Easter weekend (only one of which might be construed as having any religious significance), the Maryland statute has an even more readily apparent neutral primary effect. Finally, both statutes fall far short of fostering excessive government entanglement with religion, as discussed above.

Plaintiff urges the Court to note that this Ninth Circuit case was not a school-related case, but rather, addressed a more general closing statute. The Court does not believe that this distinction bears significant relevance to the similar logical analyses required to determine the statutes' constitutionality. As noted above, although this Ninth Circuit case does not serve as binding precedent for

this Court, its analysis supports this Court's independent conclusions.

Plaintiff further urges the Court to consult *Metzl v. Leninger*, 57 F.3d 618 (7th Cir. 1995), which the Court has done. In *Metzl*, the Seventh Circuit found unconstitutional an Illinois statute that specifically named Good Friday as a school holiday. Although this Seventh Circuit case does not serve as precedent for this Court, this Court nonetheless finds that the statute at issue in *Metzl* is clearly distinguishable from § 7-103.

The Seventh Circuit recognized that Easter has become an increasingly secularized holiday. *Metzl*, 57 F.3d at 620. The Court specified that unlike Easter, Good Friday has not become a secular holiday. The Maryland statute differs from the Illinois statute in that the Maryland statute does not specify "Good Friday" or provide it as a lone holiday in its own right. Rather, the Maryland statute provides two days of vacation surrounding the secularized Easter weekend.

Moreover, the Governor of Illinois referred to the Illinois statute one year after its enactment by proclaiming that Good Friday "is a day charged with special meaning to multitudes throughout the Christian world." *Metzl*, 57 F.3d at 619. This further demonstrated to the Seventh Circuit the religious purpose of the statute. No similar state proclamation exists with reference to the Maryland statute.

Finally and most significantly, the Seventh Circuit specifically stated that it would be handling a different situation if Illinois closed schools on the Friday before Easter for a purpose related to providing a spring break rather than for a religious purpose. The Court held that if the intention of the Illinois statute had been "that the public

schools shall be closed on the Friday before Easter in order to give students and teachers a three-day spring weekend, rather than to commemorate the crucifixion of Jesus Christ, we might have a different case." *Metzl*, 57 F.3d at 623. The Maryland statute's closing of school on the Friday before and Monday after Easter clearly serves such a spring-break purpose. Indeed, the Friday before Easter is only one of two days provided by the statute to extend the secularized Easter weekend.

As discussed above, this Court finds that § 7-103 does not violate the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment. The Court will now turn to Count II of Plaintiff's Complaint.

II. Equal Protection Clause

In Count II of her Complaint, Plaintiff alleges that § 7-103 "violate[s] the Equal Protection Clause of the Fourteenth Amendment by providing public school holidays for the celebration of the religious holidays of selected faiths while failing to provide public school holidays for the celebration of religious holidays of any other faith." Revised Second Amended Complaint at 5. The great bulk of the parties' Memoranda are devoted to discussing Count I of the Complaint, and they grant Count II relatively little attention. In its own analysis, the Court has determined that Count II cannot survive summary judgment.

As explained above, Easter has become a highly secularized holiday. Md. Educ. Code § 7-103 provides all students and teachers with a long weekend surrounding that holiday. As such, the statute treats individuals of all

religious convictions the same, granting them all a four-day break around a holiday that has become secularized in nature.

This equality of treatment is not changed by the ancillary fact that some Christians may also recognize the Friday before Easter as a religious holiday. To argue to the contrary is analogous to arguing that it is a violation of Equal Protection for school to be closed on Saturdays because although such closing recognizes a secular tradition, Saturday also happens to be the Sabbath for individuals of the Jewish faith[4]. The Court believes that neither situation prompts Equal Protection analysis because neither involves the fundamental prerequisite to invocation of the Equal Protection Clause: unequal treatment of similarly situated persons. *See* Lawrence Tribe, *American Constitutional Law* 1438 (1988).

Consequently, it would be inappropriate for the Court to pursue any further an Equal Protection analysis of § 7-103 (addressing such issues as whether a fundamental right is involved as Plaintiff urges, or whether mere rationality review would apply instead). Rather, the Court concludes that because § 7-103 treats all affected individuals equally by providing them with an extended weekend surrounding a highly secularized holiday, there is no possible violation of the Equal Protection Clause. Accordingly, Count II of Plaintiff's Complaint cannot survive summary judgment.

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[4] *See also McGowan v. Maryland*, 366 U.S. 420 (1961).

Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment will be granted, and Plaintiff's Motion for Summary Judgment will be denied. A separate Order consistent with this Memorandum Opinion will issue.

ORDER

In accordance with the Memorandum Opinion, it is this 2nd day of July, 1997, ORDERED:

1. That Defendants' Motion for Summary Judgment BE, and the same hereby IS, GRANTED;

2. That Plaintiff's Cross-Motion for Summary Judgment BE, and the same hereby IS, DENIED;

3. That the Clerk of the Court CLOSE this case; and

4. That the Clerk of the Court mail copies of this Order and the Memorandum Opinion to all parties of record.

Supreme Court, U.S.
FILED
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(2)

No. 99-816

IN THE

SUPREME COURT OF THE UNITED STATES

JUDITH M. KOENICK,

Petitioner,

v.

REGINALD M. FELTON, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR *AMICUS CURIAE* AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONER

Stuart H. Newberger*
Scott E. Gant
Dylana L. Blum
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Marc D. Stern
Harvey Reiter
AMERICAN JEWISH CONGRESS
National Capital Region
2027 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 332-4001

* Counsel of Record

Counsel for *Amicus Curiae*
American Jewish Congress

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QUESTION PRESENTED

Does the mandatory, state-wide closure of all public schools in Maryland on "Good Friday" – without any secular or administrative basis – violate the establishment clause of the First Amendment as applied to the states through the Fourteenth Amendment?

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INTEREST OF *AMICUS*

The *American Jewish Congress* is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious interests of American Jewry.[1] It has a long-standing commitment to the integrity of the establishment and free exercise clauses of the First Amendment, having either represented one of the parties or filed briefs *amicus curiae* in most of the cases interpreting those First Amendment principles before this Court. The National Capital Region of the American Jewish Congress has been actively involved in many cases in the Washington, D.C. area implicating the significant constitutional issues presented by this case. It filed an *amicus* brief in support of Petitioner before the United States District Court for the District of Maryland, and also filed an *amicus* brief and participated in oral argument in support of Petitioner before the United States Court of Appeals for the Fourth Circuit. Through counsel, the parties have consented to the filing of this *amicus* brief. Letters of consent have been lodged with the Clerk.

REASONS FOR GRANTING THE PETITION

This Court has long recognized that the establishment clause requires the utmost vigilance against governmental endorsement of *any* religion – either on a practical or symbolic level – particularly when religious issues affect the nation's public schools. School children are especially susceptible to the influence of state and local government

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[1] Counsel for a party did not author this brief, in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

authority. Indeed, the Court recently granted *certiorari* in a case raising important establishment clause issues arising in the public school setting. *See Santa Fe Indep. Sch. Dist. v. Doe, cert. granted,* 68 U.S.L.W. 3325 (U.S. Nov. 15, 1999) (No. 99-62) (whether school policy permitting student-led, student-initiated prayer at football games violates the establishment clause). The question presented here requires the Court to determine the appropriate constitutional criteria applicable to state-sponsored holidays as well as the impact of this Maryland statute[2] on thousands of public school children who do not observe the solemn Christian holiday, Good Friday.

There is a clear split in the Circuits on these issues. The lower courts have traveled in conflicting and confusing directions as they attempt to construct the proper constitutional framework for determining whether statutes like Maryland's violate the establishment clause by mandating state public holidays for Good Friday – holidays for public schools, state governmental offices, public employment and other areas that affect the fabric of civic life. This Court must establish a clear, uniform set of criteria to guide the lower courts and the states as they consider the constitutionality of such holidays.

A. Maryland's Law Impermissibly Endorses Religion

Maryland's statute makes it easier for observers of Good Friday to practice their religion than for adherents of other religious denominations to practice theirs. On that basis the

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[2] *See* Md. Code Ann., Educ. § 7-103(c)(1)(iii) (providing for the closing of all public schools "[t]he Friday before Easter").

statute should be subject to strict scrutiny review. *See Larson v. Valente*, 456 U.S. 228, 246 (1982).

But quite apart from conferring a tangible advantage on some religious groups but not others, the statute is a profound symbol of the concert of "church" and "state." When a state undertakes no effort to substantiate *any* administrative or secular need for declaring a state-wide school holiday and, nonetheless, proceeds to close all of its schools on what may be the holiest of Christian holy days, there is ample reason to perceive the holiday as government sponsorship of a particular religion.

This Court's recent establishment clause jurisprudence has not diminished the longstanding recognition that "symbolic union[s] of government and religion" tread dangerously on First Amendment principles. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 392 (1985); *Agostini v. Felton*, 521 U.S. 203, 227 (1997). This danger is only heightened when dealing with young school children, for "[t]he symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *Ball*, 473 U.S. at 390; *see also Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools").

Here, of course, the Maryland statute does not literally inject religious practices "into" the public schools – rather, it mandates that all of the State's public school students take a holiday on Good Friday. This is certainly not the same circumstance that this Court has addressed in the past. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Wallace v. Jaffree*,

472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987). However, the impressionability of "children in their formative years" operates with equal force whether the children are construing the meaning of what they are told to do in school *or the significance of when school will be closed. Ball*, 473 U.S. at 390. Thus, Jewish and other non-Christian students throughout Maryland are at risk of alienation – from other students, teachers and administrators – when the State mandates the closing of school for a religious holiday not observed by them. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) ("Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny."). Jewish parents can only speculate – given the lack of any secular or administrative basis – when their children ask why the State of Maryland *mandates* that their school must be closed for "Good Friday."

The Fourth Circuit's decision upholding the Maryland statute casts aside vital establishment clause principles. The Court of Appeals casually dismissed the need for a genuine (rather than a presumed) secular rationale for the Good Friday holiday, based merely on the fact that Maryland enacted this religious-based holiday in the 19th Century. The Court of Appeals apparently was satisfied that Maryland's mandate of a Good Friday school holiday has been on the books for over a century, and is now rooted into state calendars, holidays and practices. *See Koenick v. Felton*, 190 F.3d 259, 266 (4th Cir. 1999) (Good Friday has "been a part of the Montgomery County School Public School Calendar for 130 years [and] . . . become part of the school community's expectations and plans . . . ."). Apparently, the Court of Appeals has created a new rule of constitutional law: practices that would otherwise violate the establishment clause will pass constitutional muster based

only on the passage of time, political convenience or majority acquiescence.

Maryland's Good Friday holiday was, of course, not founded upon contemporary administrative considerations, but instead reflects the religious perspective of its 19th Century enactors. Lacking any secular or administrative justifications, the historical origins of Good Friday as a school holiday – which still govern Maryland today – undoubtedly are predicated on Good Friday's *religious* character. To ignore the obvious religious origins of the Good Friday school holiday makes a mockery of the principle that courts must "remain sensitive, especially in the public schools, to 'the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others.'" *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 269 (1990) (Marshall, J., concurring) (quoting *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 627-28 (1989) (O'Connor, J., concurring in part and in judgment)). Because "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. . . [i]n no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing . . . what the Constitution sought to keep strictly apart." *McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (Opinion of Frankfurter, J.).

Even if Maryland's mandate of Good Friday as a school holiday is predominantly symbolic in nature, that symbolic embrace of this most solemn and important Christian holiday violates the establishment clause. The State of Maryland has placed its imprimatur on Good Friday in the eyes of its public school students and the rest of its citizens. It has determined – without regard to how many students and

school employees might be absent – that *all* school employees must take Good Friday as a day of paid leave, and that no students can attend school. By upholding the constitutionality of Maryland's law, the lower courts run afoul of this Court's admonition that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*, 370 U.S. at 431.

B. Maryland Has Not Proffered A Secular Or An Administrative Basis For The School Closing Law

The establishment clause ensures that ours is *not* a Christian nation; rather, it is a pluralistic one, comprised of peoples of myriad faiths, beliefs and views. Jewish citizens, like other non-Christians, are deeply affected by laws, like Maryland's, that declare Good Friday a holiday for all of the State's public schools, without regard to valid secular or administrative reasons.

It is important to note that the American Jewish Congress is *not* offended by the idea that some or many public schools could be closed on Christian holidays, including Good Friday. What does offend is for a state to declare an important religious holiday a *public* school holiday without any evidence that the state's action is grounded on secular purposes.

Consistent with that principle, the handful of public schools around the nation that choose to close for the Jewish high holidays Rosh Hashanah and Yom Kippur – when they fall on schools days – may do so consistent with establishment clause principles when the closings are based

on documented patterns and empirically-based projections of student and teacher absenteeism. Maryland's statute lacks any such factual basis, and the litigation record below – particularly given the summary judgment stage at which the case was decided – similarly lacks documented support for the statute's *presumed* purpose.

It might seem odd that the constitutionality of closing all the public schools on Good Friday should turn on the results of an empirical study or other *bona fide* evidence to project student and teacher absenteeism. The establishment clause, however, requires such an undertaking. As with many other constitutional commitments, guarding against establishment clause violations necessitates a showing that government has acted for reasons other than religion. Here, requiring evidence to support Maryland's *post hoc* assertion of administrative need for closing all of the State's schools on Good Friday is the only way to protect the First Amendment rights of all Maryland's citizens who do not observe Good Friday. *Cf. Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) (Although the "constitutionality of statutes is typically determined by reference to general considerations . . . , [i]t was the state's decision to pitch its defense on the infeasibility of keeping the schools open of Good Friday. The question of feasibility is not one that can be settled as a matter of first or general principles. It requires a showing of fact that the state has not attempted to make."). The trial court's grant of summary judgment, upholding the Maryland statute – and its affirmance on appeal – was based on a record that lacked such evidence. Accordingly, summary judgment clearly was an inappropriate vehicle for resolving this important issue. *Cf. Edwards*, 482 U.S. at 634 (Scalia, J., dissenting).

C. The Conflict Among The Lower Courts Warrants Review By This Court

In *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), the Seventh Circuit invalidated an Illinois law[3] requiring the closing of all public schools on Good Friday.[4] Like Maryland's law, the Illinois statute designated Good Friday as a holiday for all public school students and teachers throughout the state.[5] In contrast to the Fourth Circuit here, the Seventh Circuit in *Metzl* found that the effect of Illinois singling out Good Friday for special recognition by its public schools impermissibly advanced religion:

> The state law closing all public schools on Good Friday makes the burden of religious observance lighter on Christians than on the votaries of other religions. The Christian does not have to absent himself from school on a school day, and so perhaps have to incur the

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[3] *See* 105 Ill. Comp. Stat. Ann. 5/24-2.

[4] The American Jewish Congress also participated in the *Metzl* case.

[5] The Maryland and Illinois statutes also identify Christmas and Thanksgiving as legal school holidays. While these days certainly have religious origins, the courts have observed that both Christmas and Thanksgiving have acquired significant non-religious components. *See Cammack v. Waihee*, 932 F.2d 765, 790 (9th Cir. 1991) (Nelson, J., dissenting) ("I find this equation of Good Friday with Christmas and Thanksgiving both distasteful to practicing Christians, who do not wish a serious day permeated by mirth and levity, and unsettling to adherents of other religions or nonreligious persons, who would not desire their secular celebrations of Thanksgiving and Christmas to be linked to a holiday they could not imagine honoring."); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 633 (1989) ("The Easter holiday celebrated by Christians may be accompanied by certain 'secular aspects' such as Easter bunnies and Easter egg hunts; but it is nevertheless a religious holiday.") (O'Connor, J., concurring in part and in judgment).

> inconvenience of a make-up exam on a later day, as the observant Jew might have to do if his school district decided not to close for any Jewish holidays. . . . [T]he First Amendment does not allow a state to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice *their* religion . . . .

Id. at 621.

In addition to finding Illinois's statute "accorded special recognition to Christianity beyond anything . . . shown to be necessary to accommodate the religious needs of the Christian majority," *Id.*, the Seventh Circuit held that Illinois should carry the burden of proving the existence of a legitimate secular purpose for the Good Friday holiday. *Id.* at 622. As Chief Judge Posner explained, "[t]he existence of such a justification [for the Good Friday school closing law] is in the nature of a defense, and the burden of producing evidence in support of a defense is, of course, normally on the defendant." *Id.* Because Illinois "failed to show that its law closing the public schools *throughout the state* on Good Friday is necessary to prevent a wasteful expenditure of educational resources," the Court invalidated the state's Good Friday law as violative of the establishment clause. *Id.* at 623 (italics in original).

Not only do conflicts exist between the Fourth and Seventh Circuits regarding Good Friday public holidays, but the Seventh Circuit's own treatment of the issue is inconsistent. Despite the Seventh Circuit's holding in *Metzl* that Illinois's Good Friday school closing law violated the establishment clause, a different panel of the Seventh Circuit subsequently has held that Indiana's recognition of Good Friday as a holiday for state employees does not violate the establishment clause. *See Bridenbaugh v. O'Bannon*, 185

F.3d 796 (7th Cir. 1999). *Bridenbaugh* also is the subject of a petition for *certiorari* currently pending before this Court, No. 99-812.

The Fourth and Seventh Circuits have rendered fundamentally different rulings regarding the critical issue of who should bear the burden of proof in the these cases, as well as the ultimate constitutionality of such laws. Faced with contradictory rulings, the states and the nation's school systems need this Court's guidance regarding the appropriate standards and applicable burdens for ascertaining what role, if any, religious holidays may play in mandating state-wide public school closures.

CONCLUSION

The Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

Stuart H. Newberger*
Scott E. Gant
Dylana L. Blum
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Marc D. Stern
Harvey Reiter
AMERICAN JEWISH CONGRESS
National Capital Region
2027 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 332-4001

* Counsel of Record

Counsel for *Amicus Curiae*
American Jewish Congress

No. 99-816

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IN THE

Supreme Court of the United States

JUDITH M. KOENICK,

Petitioner,

v.

REGINALD M. FELTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ROGER W. TITUS
Counsel of Record
MITCHELL Y. MIRVISS
KEVIN B. COLLINS
VENABLE, BAETJER AND HOWARD, LLP
Attorneys for Respondents
One Church Street, Fifth Floor
Rockville, Maryland 20850
(301) 217-5600

156622

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does the Maryland statute establishing the holidays for public schools, including from "[t]he Friday before Easter and from then through the Monday after Easter," violate the Establishment Clause?

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Respondents, Reginald M. Felton, President of the Board of Education of Montgomery County, Maryland, and Dr. Jerry D. Weast, Superintendent of Schools for Montgomery County (hereinafter collectively "Board of Education") respectfully request that this Court deny the petition for a writ of certiorari seeking review of the of the Fourth Circuit's opinion in this case, which is reported at 190 F.3d 259.

REASONS FOR DENYING THE WRIT[1]

The petition for a writ of certiorari filed by Judith M Koenick ("Ms. Koenick") should be denied because she (1) presents a question that is not the one decided by the Fourth Circuit; (2) seriously mischaracterizes the nature of the statute attacked by her in order to be able to rely upon authority dealing with a materially different species of statute; (3) conjures up notions of conflict between the circuits and decisional chaos when none exists; and (4) lacks standing. When the actual question decided by the Fourth Circuit is considered and the full text of the Maryland statute at issue examined, the inevitable conclusion is that this case is one involving the routine application of well-developed principles of law that is simply not worthy of review by this Court, and certainly not at the behest of a petitioner lacking standing.

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1. The petition in this case includes an accurate description of the opinions below, the parties to the case, the jurisdiction of this Court and the text of applicable constitutional and statutory provisions. Although the Board of Education disagrees with certain portions of the Statement of the Case, any corrections or misstatements are noted below.

I. THE QUESTION PRESENTED BY THE PETITION DIFFERS MATERIALLY FROM THE ISSUE THAT WAS DECIDED BY THE FOURTH CIRCUIT.

In her petition, Ms. Koenick posits the question presented as being whether "the Establishment Clause permits a state to require all public schools to close on Good Friday." This is simply not the issue presented by this case.

The Maryland statute at issue does not even mention Good Friday, much less encourage students to worship or even consider any religious significance of Good Friday. Rather, the statute provides for the closure of public schools from the Friday before through and including the Monday after Easter. This four-day break is fully supported by secular reasons contained in the record, including predictable absenteeism on these days among both teachers and students that could disrupt the educational program.[2] The same section of Maryland law which establishes this four-day Easter or spring break also provides, *inter alia*, for the closure of public schools on Thanksgiving day and the day after and on Christmas Eve through January 1. Maryland Code Ann., Educ. § 7-103(c) (1999).[3] The statute makes no mention of religion or worship and, at most, is a permissible accomodation of religion.

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2. In light of the high rate of absenteeism of students and teachers on the Jewish holidays of Yom Kippur and Rash Hashanah, the Board of Education also closes its schools on those days in order to economize the scarce educational resources that would be wasted if classes were held on those days.

3. The text of the statute is set forth on p. 3 of the petition.

The proper characterization of the four-day Easter or spring break provided by § 7-103(c) is not a matter of semantics. This Court has repeatedly explained that in analyzing Establishment Clause claims, "[e]very government practice must be judged in its unique circumstances to determine whether it [endorses] religion." *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., *concurring*). The semantics involved in Ms. Koenick's formulation of the question presented are also no accident for, as will be explained below, she finds greater solace in decisions involving materially different statutory provisions that include overt state encouragement of worship on Good Friday.

In short, if this Court were to grant the petition, the issue before this Court would be materially different from the question presented by Ms. Koenick. Accordingly, the Board of Education has restated the question on the first page of this brief in opposition in order to provide this Court with an accurate description of the rather pedestrian issue presented by the petition.

II. BY IMPROPERLY CHARACTERIZING § 7-103(c) AS CREATING A PUBLIC SCHOOL HOLIDAY FOR "GOOD FRIDAY," THE PETITIONER DISTORTS THE NATURE OF THIS CASE.

In her petition, Ms. Koenick consistently mischaracterizes the public school holiday established by § 7-103(c) as simply creating a public school holiday for "Good Friday." Relying on this mischaracterization of § 7-103(c), Ms. Koenick then relies on a single decision from

the Seventh Circuit, *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), and baldly proclaims that there is a great conflict among the circuits that warrants granting certiorari in this case. Ms. Koenick's characterization of § 7-103(c) as a "Good Friday" statute is misplaced, and consequently, so is her reliance on *Metzl* and the other "Good Friday" Establishment Clause cases cited by her.

By placing heavy emphasis upon the fact that public schools are closed on, in her words, "Good Friday," Ms. Koenick misconstrues, distorts and ignores the express language of § 7-103(c), which simply establishes a four-day break anchored around Easter, a day, like Christmas, of undeniable religious significance but which also has acquired over the years numerous secular trappings. The correct context of this law is that, as part of a broader statute establishing days on which public schools are open or closed, it provides for a four-day Easter or spring break. This mirrors the nine-day Christmas break, and is similar to the four-day Thanksgiving break, which are also established for public schools by § 7-103(c).

Finally, in characterizing § 7-103(c) as simply a "Good Friday" statute, Ms. Koenick fails to take into account or even discuss the inclusion of the Monday after Easter as the end point of the four-day Easter or spring break. As Ms. Koenick conceded, and the district court found, there is virtually no recognized religious significance to the Monday after Easter, and in fact, the Monday after Easter has no more recognized religious significance than any Sunday or December 28 or December 29.

In short, Ms. Koenick's mischaracterization of § 7-103(c) as a statute closing public schools in Maryland

for "Good Friday" to promote or facilitate observance of that Christian holy day is a wholly unfounded effort to force fit the facts of this case into those of cases more to her liking. Consequently, her reliance on the smorgasbord of Establishment Clause cases that involve public school holidays or other governmental activities ***solely*** on Good Friday, including the principal case upon which she relies in her petition, *Metzl v. Leininger*, is misplaced.

III. THERE IS NO DIVISION AMONG THE CIRCUITS AS TO THE CONSTITUTIONALITY OF, OR THE PROPER TEST TO BE APPLIED TO, STATUTES ESTABLISHING "GOOD FRIDAY" AS EITHER A LEGAL HOLIDAY OR A PUBLIC SCHOOL HOLIDAY.

As her principal argument in support of granting the petition, Ms. Koenick asserts that lower courts are deeply divided on the constitutionality of establishing a public school holiday or legal holiday on "Good Friday." Even assuming the applicability of decisions which involve a public school holiday or other accommodation on solely Good Friday, *see supra* Section 2 of this Brief in Opposition, there is, in fact, no great division among the circuits regarding the constitutionality of those statutes or similar type accommodations. To the contrary, all of the decisions mentioned in the petition compel the conclusion that the Fourth Circuit's analysis regarding the constitutionality of § 7-103(c) was consistent with the decisions of other circuits and this Court, and not evidence of a chaotic division in the decisions of lower courts.

The principal case relied on by Ms. Koenick for her argument that there is a great divide among the circuits is

Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995), in which the Seventh Circuit held that a 1941 Illinois statute expressly establishing "Good Friday" as a school holiday violated the Establishment Clause. Ms. Koenick's reliance on *Metzl* as establishing a split among the circuits is misplaced for several reasons.

First, in stark contrast to the statute at issue in this case, there was legislative history related to the Illinois "Good Friday" statute indicating that it was enacted to promote the Christian holy day of "Good Friday." 57 F.3d at 619. In analyzing the Illinois Good Friday statute under the *Lemon* test, the Seventh Circuit simply determined that there was an absence of evidence establishing any secular purpose advanced in support of the statute (in sharp contrast to this case) and accordingly, it transgressed the Establishment Clause. 57 F.3d at 623. The Seventh Circuit expressly noted that had Illinois produced evidence to show that public schools were closed on the Friday before Easter in order to give students and teachers a three-day Spring weekend, rather than to commemorate the crucifixion of Jesus Christ, it would be analyzing a different case. *Id.*

On the other hand, there have been a number of decisions by circuits, including the Fourth Circuit in this case, in which state statutes establishing the Friday before Easter as either a public school holiday, legal holiday or other similar activity, have been analyzed under the *Lemon* test and upheld against Establishment Clause challenges. *See Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir.), *reh'g en banc denied*, (7th Cir. 1999), *petition for cert. filed*, (Nov. 12, 1999); *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999); *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), *reh'g en banc denied*, 944 F.2d 466 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992).

However, unlike *Metzl*, the opinions in *Bridenbaugh, Granzeier and Cammack* each determined that the state statute or challenged conduct at issue in each of the respective cases was supported by unrefuted secular purposes and that the state statute or challenged conduct passed constitutional muster under the three-part test established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Bridenbaugh*, 185 F.3d at 799-801 (Seventh Circuit, relying on its previous decision in *Metzl*, concluded that Indiana state statute establishing Good Friday as a legal holiday had a valid secular justification of providing a long spring weekend for state employees); *Granzeier*, 173 F.3d 573-74 (in rejecting challenge to the closing of various Kentucky state and county courts and court-related offices on Good Friday, Sixth Circuit determined that numerous secular purposes supported closing the state and county courts and court-related offices, including that many school children were on spring vacation the following week and that many Kentucky families start their vacations early on Good Friday);[4] *Cammack*, 932 F.2d at 775-77 (Ninth Circuit rejected challenge to Hawaii statute which declared Good Friday to be a legal holiday finding that the statute accomplished a secular purpose of providing Hawaiians with a legal holiday, labor unions were the most ardent supporters of the statute, the statute was not motivated by a wholly religious purpose, and the primary effect of the statute was not the advancement of Christianity).

Notwithstanding the now rather routine application by the circuits of the *Lemon* test, or some variant of it, to statutes that establish legal holidays, public school holidays or some

4. In *Granzeier*, the Sixth Circuit treated the "endorsement" test suggested in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J. *concurring*), as a refinement or clarification of the *Lemon* test.

other accommodation on Good Friday, and even though this case does not relate solely to Good Friday or promote or encourage worship, the petitioner asks this court to grant certiorari in this case in order to establish strict scrutiny as the appropriate test for such governmental conduct. (Pet. at 18). In her petition, Ms. Koenick argues that § 7-103(c) facially prefers the Christian faith over other faiths or nonfaith and that it should be invalidated under the strict scrutiny test applied by this Court in *Larson v. Valente*, 456 U.S. 228, 246 (1982). Ms. Koenick's invitation to grant certiorari to reach this issue is ill-founded for several reasons.

As the district court in this case recognized, no reported decision has ever applied a strict scrutiny test in an Establishment Clause case involving government recognition, in any form, of holidays that were once, or are presently, religiously based. *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Bridenbaugh*, 185 F.3d 796 (7th Cir. 1999); *Granzeier*, 173 F.3d 568 (6th Cir. 1999); *Metzl*, 57 F.3d 618 (7th Cir. 1995); *Cammack*, 932 F.2d 765 (9th Cir. 1991); *Freedom of Religion Foundation v. Thompson*, 920 F. Supp. 969 (W.D. Wisc. 1996); *Mandel v. Hodges*, 127 Cal. Rptr. 244 (Cal. Ct. App. 1976); *Griswold Inn, Inc. v. Connecticut*, 441 A.2d 16 (Conn. 1981).

Furthermore, to apply strict scrutiny (instead of the *Lemon* test) in a case such as this would overturn several well-established tenets of Establishment Clause jurisprudence enunciated by this Court.

First, to apply strict scrutiny in this case would require focusing exclusively on the religious component of § 7-103(c) which, as this court has noted, would inevitably

lead to invalidation under the Establishment Clause. *See Lynch*, 465 U.S. at 680. As this Court noted in *Lynch*, "[w]ere the test that government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." 465 U.S. at 681 n.6.

Second, to apply strict scrutiny to statutes such as § 7-103(c) would attribute unconstitutional motives to statutes when a plausible secular purpose for the statute could be discerned from the face of it. *See Muller v. Allen*, 463 U.S. 388, 394-94 (1983). Moreover, even if one were to assume that the primary purpose of § 7-103(c) at the time of its original enactment in 1865 was to encourage people to observe Easter, this fact alone does not establish that the statute presently has a religious purpose, nor would this fact invalidate the statute, as the purpose for such a law may have changed over 130 years. *See McGowan v. Maryland*, 366 U.S. 420 (1961).

Accordingly, this Court has repeatedly noted that a state may accommodate religion without violating the Establishment Clause. *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

This Court's Establishment Clause jurisprudence plainly does not support the application of strict scrutiny to § 7-103(c) in this case. Nor have any of the circuits evinced the desire to apply the strict scrutiny test in similar cases. *See Metzl*; *Bridenbaugh*; *Granzeier*; *and Cammack*. Accordingly, this case does warrant granting the petition to undertake any such analysis. The standard to be applied is well-settled and need not be revisited.

In short, there is no division among the circuits as to the constitutionality of, or the proper test to be applied to, statutes such as § 7-103(c), which establish legal holidays or a public school holidays on days having undisputed religious origins, such as Thanksgiving, Christmas, Easter or Good Friday.

IV. AS THE FOURTH CIRCUIT DETERMINED, § 7-103(c) IS UNASSAILABLE ON THE MERITS, AND ITS DECISION INVOLVED ROUTINE APPLICATION OF SETTLED PRINCIPLES THAT DO NOT WARRANT REVIEW BY THIS COURT.

Under existing, relevant Establishment Clause jurisprudence, § 7-103(c) easily passes constitutional muster. Under *Lemon*, the governmental action in question (1) must have a secular purpose; (2) not have the principal or primary effect of advancing or inhibiting religion; and (3) not foster an excessive entanglement with religion. 403 U.S. at 612-13.

There are numerous secular purposes supporting § 7-103(c), including that (1) closing schools on the Friday before and the Monday after Easter is appropriate because of the expected high rate of absenteeism among both students and teachers; (2) absences disrupt the effectiveness of instruction and require substantial expenses to be incurred for hiring substitute teachers; (3) absences result in wasting valuable and limited educational resources; and (4) uniformity is desirable in scheduling a four-day Spring break for all Maryland public schools at a time of year when many Americans, including Marylanders, will travel away from

home in order to celebrate Easter or to take a Spring vacation.[5]

With respect to the second prong of the *Lemon* test, § 7-103(c) does not have the principal or primary effect of advancing or inhibiting religion. *See* 190 F.3d at 267. As the Fourth Circuit noted, § 7-103(c) does not express any preference toward the practitioners of any one faith over any other, nor does the statute endorse or advance a particular religion or religion generally. *Id.* As the Fourth Circuit also noted, § 7-103(c) does not grant an added benefit to members of one faith that it does not grant to everyone, but rather merely gives students, teachers, and families the days off to spend as they like. *Id.* In fact, § 7-103(c) is far more innocuous than the City of Pawtucket's inclusion of a nativity scene in its annual Christmas display, which this Court held passed constitutional muster. *See Lynch v. Donnelley*, 465 U.S. 668 (1984).

The four-day Easter or spring break established in § 7-103(c) during which time students, teachers, and families can vacation, celebrate Easter, participate in numerous Easter-related secular activities, or travel is no different than the four-day Thanksgiving and nine-day Christmas breaks embodied in the same statute. Moreover, there is no emphasis placed by § 7-103(c) on "Good Friday" but rather, the four-day break is anchored around the increasingly secularized holiday of Easter, which is a traditional time for Marylanders, like many other Americans, to begin Easter-related travel.

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5. As noted above in footnote 2, the same concerns over predictable absenteeism of students and teachers on the Jewish holidays of Yom Kippur and Rash Hashanah has caused the Board of Education to close its schools on those days.

As to whether § 7-103(c) causes excessive government entanglement with religion, Ms. Koenick makes the specious argument that § 7-103(c) causes excessive entanglement because Eastern and Western Christianity observe Easter on different days of the year and that state officials, such as the Board of Education, are forced to divine the "official" Easter.

Although Eastern and Western Christianity celebrate Easter on different calendar days, this is no different than their celebration of Christmas, which likewise occurs on different calendar days. *See County of Allegheny v. ACLU*, 492 U.S. at 579 n.2. Unlike the "comprehensive" and "continuing" surveillance that this Court has determined results in excessive entanglement in cases involving statutes providing government aid to church-related elementary and secondary schools and their teachers, there is simply no similar type interaction or contact required by § 7-103(c).

As the Fourth Circuit recognized, the Board of Education simply consults commercially printed calendars to determine the date that Easter is celebrated each Spring. This type of conduct by the Board of Education simply does not rise to the type of "comprehensive, discriminating and continuing state surveillance" prohibited by the entanglement prong of *Lemon*. *See Lynch v. Donnelly*, 465 U.S. at 684.

V. MS. KOENICK LACKS STANDING TO PURSUE HER ESTABLISHMENT CLAUSE CLAIMS.

Ms. Koenick is no longer employed by the Board of Education, and she has not pursued her equal protection claim in her petition. However, relying on her status as a taxpayer, she continues to pursue her Establishment Clause claim, and the Fourth Circuit ruled that she had standing to do so, citing

the "expenditures of her tax revenues toward the paid holiday on the Friday before and the Monday after Easter for public school employees." 190 F.3d at 263. There is nothing in the record to support this observation by the Fourth Circuit, and Maryland law expressly refutes any notion of additional public expenditures for the closure of schools on the Friday and Monday in question.

Section 7-103(c) is part of a larger statutory section which sets forth the parameters by which all public school systems in Maryland must establish their annual school calendar, including defining the required number of school days and holidays. Section 7-103(a) mandates that public schools be open for 180 school days a year, for a minimum of 1,080 hours during a 10-month period in each school year, and that they may not be open on Saturdays, Sundays or statutory holidays, including the two days at issue in this case. Local boards of education in Maryland, in accordance with the statutory mandate, select 180 instructional days out of the 365 days in each year. All that § 7-103(c) does is to direct local boards of education not to select Saturdays, Sundays or state holidays when choosing the 180 days on which they will operate. Accordingly, there is simply no basis for concluding that additional taxpayer dollars are required in connection with the closure of schools on the two days at issue in this case.

Accordingly, under this Court's applicable precedents, Ms. Koenick lacks standing to pursue her Establishment Clause claim because she cannot point to any expenditure of public tax revenues for the closure of schools on the two days in question. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

CONCLUSION

The question Ms. Koenick presents and the statute that she attacks have been distorted to fit jurisprudence that otherwise does not support her position. Simply put, this case does not present an appropriate vehicle for examination of the issue that she presents, but rather represents the routine and pedestrian application of well-developed principles of law.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROGER W. TITUS
Counsel of Record
MITCHELL Y. MIRVISS
KEVIN B. COLLINS
VENABLE, BAETJER AND HOWARD, LLP
Attorneys for Respondents
One Church Street, Fifth Floor
Rockville, Maryland 20850
(301) 217-5600

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In the
SUPREME COURT OF THE UNITED STATES

JUDITH M. KOENICK, *Petitioner*,

v.

REGINALD M. FELTON, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

EUGENE R. FIDELL
(*Counsel of Record*)
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK LLP
2001 L Street, N.W.
Washington, DC 20036
(202) 466-8960

DWIGHT H. SULLIVAN
AMERICAN CIVIL LIBERTIES
UNION OF MARYLAND
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES
UNION OF THE NATIONAL
CAPITAL AREA
1400 20th Street, N.W.
Washington, DC 20036
(202) 457-0800

Attorneys for Petitioner

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ARGUMENT

1. Petitioner has standing

The Court of Appeals held that petitioner has standing because, as a taxpayer, she bears part of the burden of funding a paid public school holiday around Easter. Pet. 8a. It reasoned that the allegedly improper expenditure of public funds constitutes an injury to municipal taxpayers. *Id.* 7a-8a.

Respondents reject this, alleging that "nothing in the record" supports the Fourth Circuit's observation that Maryland's public school calendar statute establishes a paid holiday on the Friday before Easter. Opp. 13. In essence, they maintain that the schools are open and teachers are paid for the same number of days regardless of the designation of any particular holidays. This argument is incorrect because it overlooks respondents' twelve-month employees, such as the board's central administrative staff. These employees receive a paid holiday on Good Friday that they would not receive but for Md. Code Ann., Educ. § 7-103(c) (1999) (hereinafter § 7-103).

"The number of days at work for a twelve-month unit member shall be determined by subtracting Saturdays, Sundays, *holidays*, and annual leave from the total days in the year." J.A. 41 (MCPS Collective Bargaining Agreement) (emphasis added). As a result, twelve-month employees work two fewer days because of the Good Friday and Easter Monday holidays. Thus, as a direct consequence of § 7-103, petitioner's tax dollars support paid Good Friday and Easter Monday holidays for respondents' twelve-month employees.

2. Section 7-103 closes Maryland's public schools for a religious holy day

Contrary to respondents' suggestion, the petition correctly and fairly states the issue presented to and decided by the Court of Appeals. Section 7-103 mandates that all public schools close from the "Friday before Easter and from then through the Monday after Easter." The statute, on its face, requires public schools to close on Good Friday, which is universally understood to be the "Friday before Easter, a holy day of the Christian church, observed as commemorative of Christ's crucifixion." NEW WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 656 (1981). Respondents also ignore the Montgomery County Public Schools' own explicit references to the "Good Friday" holiday in documents predating this litigation. *See, e.g.*, J.A. 65, 66 (MCPS School Calendar Announcements). Other Maryland school systems' official calendars have similarly referred *in haec verba* to the "Good Friday" holiday. *See, e.g.*, J.A. 174-78. These references merely recognize the obvious: "the Friday before Easter" and "Good Friday" are one and the same.

Describing Good Friday without employing the words "Good Friday" cannot insulate § 7-103 from Establishment Clause challenge. Would it make a difference constitutionally if, instead of requiring that the King James Bible be read at public school assemblies, respondents required that principals "read selected passages from a book that was originally written in Greek and was translated into English by a committee of scholars in 1611"?

When it enacted § 7-103, the Maryland General Assembly obviously knew that the Friday before Easter is the Christian holy day known as Good Friday. This case is about Good Friday. To argue otherwise "is to appeal to unreality." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

Even if § 7-103 were properly characterized as an "Easter" holiday statute, the Establishment Clause analysis would remain the same because Easter is a religious holiday. While the District Court concluded that Easter is a "highly secularized 'holiday,'" Pet. 25a, the Court of Appeals correctly dismissed that characterization as unsupported "in the record or otherwise." *Id.* 5a n.7. Quite the reverse, the record demonstrates that more than two-thirds of adult Americans attend church on Easter, a far higher percentage than on a typical Sunday or on Christmas Eve and Christmas Day combined. J.A. 296-97. This surge in church attendance demonstrates that, unlike Christmas and Thanksgiving, Easter remains a predominantly religious event. While Easter "may be accompanied by certain 'secular aspects' such as Easter bunnies and Easter egg hunts," it "is nevertheless a religious holiday." *County of Allegheny v. ACLU*, 492 U.S. 573, 633 (1980) (O'Connor, J., concurring).

Respondents find it telling that § 7-103 establishes not only Good Friday, but also Easter Monday as a public school holiday in Maryland. Opp. 4. But Maryland holiday law makes clear that the Easter Monday holiday is an extension of Easter. Specifically, the Maryland Code provides that if a holiday falls on a Sunday, it will be observed "on the next Monday after that date." MD. ANN. CODE art. 1, § 27(b) (1998). Unlike Christmas and Thanksgiving, Easter never falls on a weekday. Thus, it was

unnecessary for the legislature to name Easter as a public school holiday to accommodate religious observance, and an informed observer would conclude that the Easter Monday holiday constitutes the public schools' observance of Easter.[1] And indeed, consistent with this, the official Montgomery County school calendar identifies the Good Friday and Easter Monday school closures as the "Easter" holiday. J.A. 150. Far from refuting petitioner's claim that § 7-103 is unconstitutional, therefore, the statute's creation of an Easter Monday holiday (a legislative approach shared only with the Virgin Islands) is an integral part of the Establishment Clause violation.

3. The lower courts are plainly divided over the permissibility of establishing religious holy days as public holidays

The petition cites six federal and state cases that invalidate laws or practices according Good Friday special status and seven federal and state cases (including this one) that uphold such laws or practices. Pet. 15-18. Respondents are therefore mistaken when they accuse petitioner of "rel[ying] on a single decision from the Seventh

[1] Parliament made Easter Monday a legal holiday under Edward VI. Keeping of Holy Days and Fasting Days Act, 1551-52, 5 & 6 Edw. 6, ch. 3, § 1 (Eng.). It was a day of obligatory rest and worship. The law required that individuals abstain from labor and that they "proceed to their parish church or chapel . . . and there to abide orderly and soberly during the time of the common prayer preaching or other service of God." Act of Uniformity, 1551-52, 5 & 6 Edw. 6, ch. 1, § 1 (Eng.). The act of Edward VI was not repealed until 1969. The Statute Law (Repeals) Act, 1969, ch. 52 (Eng.).

Circuit and baldly proclaim[ing] that there is a great conflict among the circuits that warrants granting certiorari in this case." Opp. 3-4 (citation omitted).

Respondents are similarly mistaken in suggesting that the decision below can be reconciled with Chief Judge Posner's analysis in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995). Opp. 5-6. In addition to differing over outcome, the two cases diverge in their reasoning, most starkly over the allocation of the burden of proof. *Metzl* correctly imposes on the state the duty to prove a secular justification for a Good Friday holiday statute. *Id.* at 622. The Fourth Circuit, in sharp contrast, could do no better than rely on assumptions about absenteeism (without reference to any empirical basis),[2] Pet. 14a, thus effectively shifting the burden to the petitioner. Disparate views on questions as fundamental as who has the burden of proof and how it can be met clearly warrant resolution by this Court.

4. Section 7-103 violates the Establishment Clause

Strict scrutiny is the appropriate standard for assessing § 7-103's constitutionality. Certiorari should be granted to determine whether *Larson v. Valente*, 456 U.S. 228 (1982), includes a previously-unarticulated exception for religious holiday statutes. However, even under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), § 7-103 is unconstitutional. While § 7-103 fails each of *Lemon*'s three prongs, Pet. 20-21,

[2] The Court of Appeals' notion that "people expect to have these days off and have planned accordingly," Pet. 14a, is not a substitute for empirical evidence. On the contrary, this element of the decision below is transparently circular.

this discussion is limited to refuting respondents' arguments regarding the purpose prong. *See also id.* 21-22.

Respondents maintain that § 7-103 serves two basic purposes: (1) avoiding absenteeism and the inefficiencies it creates, and (2) promoting uniformity in the school calendar. Opp. 10-11. However, they offer no empirical evidence—such as survey results or attendance data from demographically-comparable school systems that *do* hold class on Good Friday—that student or faculty absenteeism would be unacceptably high if classes were held in Montgomery County. Nor have respondents ever articulated or applied to Good Friday or Easter Monday a religiously-neutral holiday attendance break point below which holding classes is not productive or efficient. Pet. 18-19; *see also id.* 14-15.

The record also explodes respondents' claim that § 7-103 serves the interest of school calendar uniformity. Maryland public school system calendars vary widely: *no two are alike*. *See* J.A. 173. Section 7-103 directly leads to such divergent calendars by giving local school boards considerable discretion in scheduling classes, so long as school is held on at least 180 days over a ten-month period. Nor would a desire in principle for calendar uniformity explain why Good Friday was selected as one of the "uniform" holidays. The legislature could just as easily have required a spring break in the first week of April. In fact, Easter's shifting time (as a "movable feast") renders it singularly unsuited to serve as the anchor for scheduling a "uniform" spring break. The Western churches celebrate Easter as early as March 22 and as late as April 25. 4 ENCYCLOPEDIA OF RELIGION 557 (Mircea Eliade ed. 1987). Thus, a spring break that pivots around Easter will vary

substantially from year to year. Calendar uniformity, therefore, does not provide a secular justification for closing schools on Good Friday.

There being no other explanation, § 7-103 is exactly what it seems to be: an endorsement of the Christian faith.

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted,

EUGENE R. FIDELL
(*Counsel of Record*)
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK LLP
2001 L Street, N.W.
Washington, DC 20036
(202) 466-8960

DWIGHT H. SULLIVAN
AMERICAN CIVIL LIBERTIES
UNION OF MARYLAND
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES
UNION OF THE NATIONAL
CAPITAL AREA
1400 20th Street, N.W.
Washington, DC 20036
(202) 457-0800

Attorneys for Petitioner

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